

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,) CR-18-00258-EJD &
) CV-18-01603-EJD
PLAINTIFF,)
)
VS.) SAN JOSE, CALIFORNIA
)
ELIZABETH A. HOLMES AND RAMESH) JUNE 28, 2019
SUNNY BALWANI,)
) PAGES 1 - 71
DEFENDANTS.)
_____)
)
SECURITIES AND EXCHANGE)
COMMISSION,)
)
PLAINTIFF,)
)
VS.)
)
RAMESH SUNNY BALWANI,)
)
DEFENDANT.)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EDWARD J. DAVILA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE
BY: JOHN BOSTIC
ROBERT LEACH
JEFFREY SCHENK
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SAN JOSE, CALIFORNIA 95113
(APPEARANCES CONTINUED ON THE NEXT PAGE.)
OFFICIAL COURT REPORTER:
IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP
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1 SAN JOSE, CALIFORNIA

JUNE 28, 2019

2 P R O C E E D I N G S

10:05AM 3 (COURT CONVENED AT 10:05 A.M.)

10:05AM 4 (COURT CONVENED AT 10:05 A.M.)

10:05AM 5 THE COURT: THIS IS 18-258, UNITED STATES VERSUS
10:05AM 6 ELIZABETH HOLMES AND UNITED STATES VERSUS RAMESH SUNNY BALWANI.

10:05AM 7 THERE'S A COMPANION CASE 18-1603 WHICH IS THE S.E.C. CASE,
10:06AM 8 AND WE'LL TURN TO THAT IN JUST A MOMENT.

10:06AM 9 MAY I HAVE THE APPEARANCES, PLEASE.

10:06AM 10 MR. BOSTIC: GOOD MORNING, YOUR HONOR. JOHN BOSTIC,
10:06AM 11 JEFF SCHENK, AND BOB LEACH FOR THE UNITED STATES.

10:06AM 12 THE COURT: THANK YOU. GOOD MORNING.

10:06AM 13 MR. DOWNEY: GOOD MORNING, YOUR HONOR. KEVIN DOWNEY
10:06AM 14 FROM WILLIAMS & CONNOLLY FOR MS. HOLMES AND WITH ME ARE
10:06AM 15 PARTNER, LANCE WADE, AND OUR CO-COUNSEL, JOHN CLINE.

10:06AM 16 THE COURT: THANK YOU. GOOD MORNING.

10:06AM 17 MR. CAZARES: GOOD MORNING, YOUR HONOR.
10:06AM 18 STEPHEN CAZARES FOR MR. BALWANI. WITH ME IS MR. STEVEN FOGG
10:06AM 19 WHO ALSO REPRESENTS MR. BALWANI.

10:06AM 20 THE COURT: THANK YOU. GOOD MORNING.

10:06AM 21 LET ME JUST THANK COUNSEL FOR -- WE DID RESCHEDULE THIS TO
10:06AM 22 THIS MORNING FROM -- I ADVANCED IT FROM MONDAY, AND LET ME
10:06AM 23 THANK YOU FOR THAT COURTESY.

10:06AM 24 WELL, TODAY WE HAVE A MOTION TO COMPEL REGARDING DISCOVERY
10:06AM 25 MATTERS. WE HAD SOME DISCUSSIONS ABOUT DISCOVERY WHEN WE WERE

10:06AM 1 LAST IN COURT AND THERE WAS SOME REPRESENTATIONS MADE.

10:06AM 2 I SUPPOSE -- LET ME INDICATE WHAT I HAVE REVIEWED HERE. I
10:06AM 3 HAVE REVIEWED YOUR PLEADINGS IN THIS CASE WHICH INCLUDE
10:07AM 4 DOCUMENT 67, WHICH IS THE MOTION TO COMPEL; DOCUMENT 79, WHICH
10:07AM 5 IS THE GOVERNMENT'S OPPOSITION; DOCUMENT 81, WHICH IS THE
10:07AM 6 REPLY, DEFENSE REPLY, AND ALL OF THE ATTACHMENTS THERETO;
10:07AM 7 DOCUMENT 82 IS MR. BALWANI'S REPLY; DOCUMENT 81-1 IS THE
10:07AM 8 DECLARATION OF MR. WADE IN FURTHER SUPPORT OF THE MOTION TO
10:07AM 9 COMPEL.

10:07AM 10 I'VE LOOKED ALSO AT THE JOINDER FILED BY MR. BALWANI AND
10:07AM 11 THAT WAS DOCUMENT 68; AND DOCUMENT 88, FINALLY, IS THE JOINT
10:07AM 12 SUPPLEMENTAL CASE MANAGEMENT STATEMENT; AND DOCUMENT 80 IS THE
10:07AM 13 JOINT STATEMENT.

10:07AM 14 HAVE I LEFT ANYTHING OUT THAT EITHER PARTY WANTS TO DRAW
10:07AM 15 MY ATTENTION TO?

10:07AM 16 MR. BOSTIC: NO, YOUR HONOR, NOT FOR THE GOVERNMENT.
10:07AM 17 THANK YOU VERY MUCH.

10:07AM 18 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

10:08AM 19 WELL, WHY DON'T I GET AN UPDATE, IF I MAY AS TO -- PARDON
10:08AM 20 ME. BEFORE WE DO THAT, I DO WANT TO DO ONE THING. I'D LIKE TO
10:08AM 21 SET THE CASE FOR TRIAL. SO WHY DON'T WE GET OUR CALENDARS OUT
10:08AM 22 AND LET'S LOOK AND SEE WHAT WOULD BE APPROPRIATE FOR THAT.

10:08AM 23 I DID READ IN YOUR STATEMENTS THAT YOU'RE SUGGESTING
10:08AM 24 SEPTEMBER OF NEXT YEAR AS A DATE FOR TRIAL. I APPRECIATE THAT
10:08AM 25 OFFER.

1 I'M GOING TO SUGGEST SOMETHING DIFFERENT. THE THOUGHT
2 OCCURS TO ME THAT THE TIME TO SECURE A JURY BEGINNING IN
3 SEPTEMBER FOR THE DURATION THAT YOU'VE INDICATED, I THINK YOU
4 SAID 90 DAYS, 3 MONTHS, PUTS US PERILOUSLY CLOSE TO THE HOLIDAY
5 SEASON. MY SENSE IS THAT THERE WILL BE PROBABLY SOME
6 DIFFICULTY TO SECURE JURORS WHO WOULD HAVE TIME AND BE CONFLICT
7 FREE AS WE APPROACH THAT HOLIDAY SEASON. I THINK THAT'S
8 PERHAPS NOT A GOOD PATH TO TAKE.

9 I'M GOING TO SUGGEST SOMETHING ELSE. I UNDERSTAND THAT
10 YOU NEED SOME TIME TO ACCOMPLISH THIS, WHAT YOU NEED TO DO.

11 MY THOUGHT WAS THAT WE, AND LET ME START WITH THE
12 AMBITIOUS DATE, PERHAPS WE COULD, PERHAPS WE COULD ENGAGE JURY
13 SELECTION SOME TIME THE END OF JUNE AND TAKE A BREAK AFTER WE
14 DO THAT. THAT MIGHT TAKE A COUPLE OF DAYS. WE CAN BEGIN THE
15 TRIAL SOME TIME, THAT IS, EVIDENCE BEGINS SOME TIME IN JULY.
16 FOR EXAMPLE, WE COULD BEGIN THE TRIAL SOME TIME ON JULY 7TH,
17 JULY 14TH, AND GO FORWARD.

18 RESTRAIN YOUR ENTHUSIASM, PLEASE.

19 (LAUGHTER.)

20 THE COURT: LET ME ALSO SUGGEST THEN, GOING FORWARD,
21 WE COULD LOOK -- I'M ALSO LOOKING AT PERHAPS JULY 14TH FOR JURY
22 SELECTION, THE WEEK OF JULY 14TH FOR JURY SELECTION.

23 WE COULD TAKE THE FOLLOWING WEEK OFF, WHICH IS THE 20TH,
24 AND THEN PERHAPS ENGAGE EVIDENCE ON THE 28TH, 29TH, THAT WEEK.

25 IF THAT DOESN'T WORK, I'M GIVING YOU SO MANY OUTS HERE, WE

10:10AM 1 COULD -- I THINK THE 28TH WE COULD, AS I SAID, BEGIN JURY
10:10AM 2 SELECTION AND THEN START EVIDENCE ON THE 4TH OF AUGUST. I
10:10AM 3 THINK THAT'S -- THAT'S BASICALLY THAT LATTER IS PUSHING IT --
10:10AM 4 ADVANCING US ABOUT A MONTH, BUT I AM -- I DO HAVE SOME CONCERN
10:10AM 5 ABOUT GOING INTO THE HOLIDAY SEASON. PERHAPS YOU HAVE HOLIDAY
10:10AM 6 PLANS AS WELL.

10:11AM 7 MR. SCHENK: YOUR HONOR, FROM THE GOVERNMENT'S
10:11AM 8 PERSPECTIVE THE GOVERNMENT IS PREPARED TO TRY THE CASE AT THE
10:11AM 9 CONVENIENCE OF THE COURT.

10:11AM 10 WHEN WE WERE LAST BEFORE YOUR HONOR IN APRIL, THE
10:11AM 11 GOVERNMENT ASKED THE COURT TO SET THE MATTER FOR TRIAL THEN
10:11AM 12 RECOGNIZING THAT DISCOVERY WAS VOLUMINOUS AND THE DEFENSE WOULD
10:11AM 13 NEED A SIGNIFICANT AMOUNT OF TIME TO PREPARE.

10:11AM 14 WE ASKED THE COURT TO SET A TRIAL DATE EVEN A YEAR FROM
10:11AM 15 THAT. SO AT THAT TIME WE PROPOSED ROUGHLY APRIL OF 2020.

10:11AM 16 SINCE THEN WE HAD A MEET AND CONFER WITH THE DEFENSE AND
10:11AM 17 IN PARTICULAR COUNSEL FOR MS. HOLMES DESCRIBED TO US THE AMOUNT
10:11AM 18 OF WORK THAT THEY HAD LEFT TO DO TO PREPARE FOR TRIAL, AND IT
10:11AM 19 WAS KIND OF WITH THAT UNDERSTANDING THAT IN ORDER TO PREPARE
10:11AM 20 THEY FELT APRIL WAS REALLY TOO SOON.

10:11AM 21 SO I THINK THE COURT HAS GIVEN US ALL FINE SUGGESTIONS
10:11AM 22 FROM THE GOVERNMENT'S PERSPECTIVE, AND WE WOULD LEAVE IT UP TO
10:11AM 23 THE DEFENSE TO HEAR IF ONE OF THOSE DATES IS A POINT AT WHICH
10:11AM 24 THEY WOULD BE PREPARED TO BEGIN THE TRIAL.

10:11AM 25 BUT FROM THE GOVERNMENT'S PERSPECTIVE WE THINK THAT WE

1 WILL BE ABLE TO BEGIN AT ANY OF THOSE DATES.

2 I WOULD ALSO ASK, THOUGH, THAT -- AND I'M SURE THIS IS
3 WHAT THE COURT MEANT -- THAT THIS IS A FIRM TRIAL DATE. WE'RE
4 NOT GOING TO BE COMING BACK BEFORE YOUR HONOR IN APRIL OF 2020
5 AND SAYING WE NOW NEED SOME ADDITIONAL TIME. WE'RE GOING TO
6 HAVE SIGNIFICANT SUBPOENAS TO SERVE IN THE CASE, MANY CIVILIAN
7 WITNESSES, AND THERE'S REAL VALUE TO HAVING FIRM TRIAL DATES.
8 SO WHEN WE ASK WITNESSES TO CLEAR THEIR SCHEDULES AND TO BE
9 AVAILABLE FOR COURT, THAT IS A ONE-TIME REQUEST AND WE CAN SAY
10 IT WITH SOME LEVEL OF CERTAINTY, AND I APPRECIATE I'M SURE
11 THAT'S WHAT THE COURT MEANT WHEN IT WAS OFFERING THESE DATES.

12 THE COURT: WELL, THANK YOU, MS. SCHENK. THAT IS
13 WHAT I MEAN. YOU'RE ASKING ME TO SET ASIDE THREE MONTHS OF
14 COURT TIME FOR THIS CASE, AND BOTH SIDES ARE ENTITLED TO THAT.

15 I'LL DO THAT. I'LL DO THAT.

16 OF COURSE, YOU KNOW THE BUSINESS OF FEDERAL COURTS. I
17 NEED TO DISAPPOINT OTHER COURT USERS FOR THAT TIME PERIOD. SO
18 I DO WANT TO SECURE FIRM TRIAL DATES THAT GIVES EVERYONE HERE A
19 FIRM EVENT HORIZON TO FOCUS ON SUCH THAT THERE WON'T BE ANY
20 CHANGES TO THAT.

21 COUNSEL.

22 MR. DOWNEY: YOUR HONOR, I WOULD SAY WE SHARE -- WE
23 UNDERSTAND THE SITUATION, WE UNDERSTAND THE NEED TO SET A DATE
24 GIVEN THE LENGTH OF THE TRIAL.

25 I WOULD SAY OF THE DATES THAT YOU HAVE SUGGESTED, WE WOULD

10:13AM 1 SUGGEST COMMENCING WITH SELECTION ON THE 28TH OF JULY.

10:13AM 2 THE COURT: EXPERIENCED DEFENSE COUNSEL ALWAYS LOOKS
10:13AM 3 TO THE LATTER DATE. NO CRITICISM INVOLVED.

10:13AM 4 WHEN I WAS PRACTICING, THAT WAS SOMETHING THAT I
10:13AM 5 OCCASIONALLY DID AS WELL.

10:13AM 6 MR. DOWNEY: NO, I UNDERSTAND. AND I ONLY WANT TO
10:13AM 7 SAY, BECAUSE THESE ISSUES ARE NOT BEFORE THE COURT TODAY, OUR
10:13AM 8 CONCERN IS NOT REALLY ABOUT THE DATE AS AN ABSTRACTION.

10:13AM 9 OUR CONCERN IS THAT THERE ARE ANY NUMBER OF ISSUES IN
10:13AM 10 TERMS OF THE GOVERNMENT'S RULE 26 COMPLIANCE THAT ARE STILL
10:13AM 11 OUTSTANDING.

10:13AM 12 WE ARE CONTINUING TO GET LARGE VOLUMES OF MATERIAL FROM
10:14AM 13 THE GOVERNMENT SO I THINK --

10:14AM 14 THE COURT: WELL, THAT'S THE PROVERB, YOU ASK AND
10:14AM 15 YOU SHALL RECEIVE. IT'S NOT A PROVERB BUT SOMEONE SAID THAT
10:14AM 16 ONCE. SO, YOU KNOW, YOU ASK FOR IT, YOU GET IT, AND THEN OF
10:14AM 17 COURSE YOU HAVE TO DIGEST IT. SO I APPRECIATE THAT. THERE'S
10:14AM 18 VOLUMINOUS DISCOVERY HERE.

10:14AM 19 I THINK IF WE SET, AND THAT WAS MY THOUGHT, AND I'M SORRY
10:14AM 20 TO INTERRUPT YOU, BUT MY THOUGHT WAS THE FIRST THING WE DO IS
10:14AM 21 LET'S SET A TRIAL DATE THAT WE CAN ALL FOCUS ON AND THEN YOU
10:14AM 22 CAN ADJUST YOUR WORK SCHEDULES ACCORDINGLY, THE PRODUCTION, AND
10:14AM 23 I'M GOING TO TALK ABOUT THAT IN A MOMENT.

10:14AM 24 JUST TO ADVANCE THAT CONVERSATION, I'LL PROBABLY BE
10:14AM 25 TELLING THE GOVERNMENT, YOU NEED TO TELL THESE FOLKS TO RAMP IT

10:14AM 1 UP BECAUSE WE NOW HAVE A TRIAL DATE.

10:14AM 2 MR. DOWNEY: YEAH. AND I EXPECT, YOUR HONOR, THAT
10:14AM 3 WE'LL BE ABLE TO WORK WITH THE GOVERNMENT AND EITHER AGREE ON
10:14AM 4 OR COME CLOSE TO AGREEING ON A PROPOSED SCHEDULE THAT CONFORMS
10:14AM 5 WITH THE TRIAL DATE.

10:14AM 6 AND I WOULD SAY WE'LL LIKELY BE ASKING THE COURT TO BE
10:14AM 7 ATTENTIVE TO THAT RULE 16 CUTOFF.

10:14AM 8 THE COURT: SURE. OKAY.

10:14AM 9 MR. DOWNEY: THANK YOU, YOUR HONOR.

10:15AM 10 THE COURT: LET ME ASK YOUR COLLEAGUES.

10:15AM 11 MR. CAZARES: YOUR HONOR, MR. BALWANI AGREES WITH
10:15AM 12 MR. DOWNEY THAT AUGUST IS LIKELY BETTER, LESS FOR OUR SCHEDULE,
10:15AM 13 BUT ALSO I'VE TRIED CASES IN THE SUMMER TIME AND JURORS ALSO
10:15AM 14 HAVE VACATION PLANS. JULY TENDS TO BE VERY DIFFICULT TO SECURE
10:15AM 15 A LONG-TERM VOIR DIRE IN FEDERAL COURT.

10:15AM 16 SO I WOULD CONCUR THAT AUGUST MAKES SENSE. IF WE START ON
10:15AM 17 THE 28TH, THAT WOULD AT LEAST AVOID SOME OF THE JUROR VACATION
10:15AM 18 ISSUES THAT OFTEN COME UP.

10:15AM 19 THE COURT: I'M SORRY. WHEN YOU SAY, "START," ARE
10:15AM 20 YOU SUGGESTING START EVIDENCE OR START THE JURY SELECTION?

10:15AM 21 MR. CAZARES: I THINK TO THE EXTENT THAT WE START
10:15AM 22 THE JURY SELECTION AT THE END OF JULY, I DON'T THINK -- I THINK
10:15AM 23 THAT WOULD LIKELY AVOID MOST JUROR VACATION ISSUES. I THINK
10:15AM 24 THAT'S THE GOAL IN SOME WAYS, TRY TO AVOID THEIR HOLIDAY
10:15AM 25 VACATIONS AND TRY TO AVOID MAYBE SOME OF THEIR SUMMER VACATIONS

10:15AM 1 AND PLANT THE TRIAL SOMEWHERE RIGHT IN BETWEEN.

10:15AM 2 THE COURT: MS. SCHENK?

10:15AM 3 MR. SCHENK: THAT IS FINE WITH THE GOVERNMENT. AS I
10:15AM 4 UNDERSTAND IT JULY 28TH IS JURY SELECTION?

10:15AM 5 THE COURT: RIGHT, THAT IS THE DATE THAT I WAS
10:16AM 6 PROPOSING JULY 28TH. MY SENSE IS THAT WE'LL PROBABLY BLEED
10:16AM 7 INTO THE 29TH.

10:16AM 8 BUT WE'LL DO JURY SELECTION THAT WEEK. THERE WON'T BE ANY
10:16AM 9 RECEIPT OF EVIDENCE OR OPENING STATEMENTS UNTIL THE FOLLOWING
10:16AM 10 WEEK.

10:16AM 11 EVIDENCE AND OPENING STATEMENTS WILL BEGIN AUGUST 4TH,
10:16AM 12 AUGUST 4TH.

10:16AM 13 IS THAT AGREEABLE?

10:16AM 14 MR. SCHENK: YES.

10:16AM 15 MR. DOWNEY: YES, YOUR HONOR.

10:16AM 16 MR. CAZARES: YES, YOUR HONOR.

10:16AM 17 THE COURT: ALL RIGHT. THANK YOU. THEN WE'VE GOT
10:16AM 18 OUR TRIAL DATE SET.

10:16AM 19 I WON'T SET A PRETRIAL CONFERENCE DATE YET. WHAT I'D LIKE
10:16AM 20 TO DO IS HAVE OUR CONVERSATION ABOUT DISCOVERY, AND THEN IF I
10:16AM 21 SET AN INTERIM STATUS DATE, AT WHICH POINT I'LL THEN SET AN
10:16AM 22 INTERIM STATUS CONFERENCE DATE DEPENDING ON THE DISCOVERY AS
10:16AM 23 YOU SUGGESTED.

10:16AM 24 OKAY. MADAM CLERK, LET'S RESERVE THAT TIME FOR TRIAL IN
10:16AM 25 THIS MATTER. I THINK COUNSEL SAID THREE MONTHS?

10:16AM 1 MR. SCHENK: YES, YOUR HONOR.

10:16AM 2 MR. DOWNEY: YOUR HONOR, WE, WE -- THAT'S OUR BEST

10:16AM 3 ESTIMATE. OBVIOUSLY WE'RE LARGELY DEPENDENT ON THE LENGTH OF

10:17AM 4 THE GOVERNMENT'S PRESENTATION WHICH WE DON'T YET KNOW, BUT

10:17AM 5 BASED ON WHAT THEY'VE REPRESENTED TO US, IT SOUNDS LIKE A GOOD

10:17AM 6 ESTIMATE.

10:17AM 7 THE COURT: OKAY.

10:17AM 8 MR. CAZARES: YES, YOUR HONOR.

10:17AM 9 THE COURT: OKAY. WE'LL DO THAT.

10:17AM 10 MADAM CLERK, AUGUST, SEPTEMBER, AND OCTOBER.

10:17AM 11 THE CLERK: YES, YOUR HONOR.

10:17AM 12 THE COURT: WE'LL SET, AS I SAID, A PRETRIAL

10:17AM 13 CONFERENCE DATE. WE'LL ADJUST THE DATES PROPER. I THINK YOU

10:17AM 14 PROBABLY HAVE OR MAY HAVE SOME FAMILIARITY. WE TYPICALLY GO

10:17AM 15 THREE DAYS A WEEK FOR TRIAL, SOMETIMES MORE, SOMETIMES LESS,

10:17AM 16 BUT WE CAN ADJUST THAT SCHEDULE AS WE GO FORWARD.

10:17AM 17 ALL RIGHT. THANK YOU. ANYTHING FURTHER ON THE TRIAL DATE

10:17AM 18 THEN?

10:17AM 19 MR. SCHENK: NO, YOUR HONOR.

10:17AM 20 MR. DOWNEY: NO, YOUR HONOR.

10:17AM 21 MR. CAZARES: NO, YOUR HONOR.

10:17AM 22 THE COURT: ALL RIGHT. THANK YOU. LET'S LOOK THEN

10:17AM 23 TO THE MOTION THAT IS BEFORE US. NOW, WHY DON'T I HEAR -- CAN

10:17AM 24 I GET AN UPDATE ON THE STATUS OF DISCOVERY?

10:17AM 25 MR. BOSTIC, DO YOU WANT TO SPEAK TO THAT?

10:17AM 1 MR. BOSTIC: YES, YOUR HONOR.

10:17AM 2 THE COURT: AND I REALIZE THIS IS THE DEFENSE
10:17AM 3 MOTION, BUT I WANTED TO GET AN UPDATE FROM THE GOVERNMENT IF
10:18AM 4 YOU DON'T MIND.

10:18AM 5 MR. BOSTIC: I'LL COME UP TO THE PODIUM SO I CAN
10:18AM 6 LOOK AT MY NOTES. LARGELY THE CURRENT STATUS OF DISCOVERY IN
10:18AM 7 THIS MATTER AS TO THE AGENCY'S FDA AND CMS, THAT STATUS IS
10:18AM 8 REFLECTED IN THE GOVERNMENT'S OPPOSITION.

10:18AM 9 AS TO LARGER DISCOVERY IN THE CASE, I UNDERSTAND THE
10:18AM 10 COURT'S QUESTION IS ABOUT DISCOVERY GENERALLY.

10:18AM 11 AS I'VE PREVIOUSLY TOLD THE COURT, DISCOVERY IN THIS CASE
10:18AM 12 IS SUBSTANTIALLY COMPLETE. THE VAST MAJORITY OF THE
10:18AM 13 GOVERNMENT'S PRODUCTION HAS BEEN SENT OVER TO THE DEFENSE.

10:18AM 14 THERE ARE STILL SOME OUTSTANDING LARGE BATCHES OF
10:18AM 15 DISCOVERY THAT ARE STILL ON THEIR WAY OVER. WE'RE MAKING EVERY
10:18AM 16 EFFORT TO GET THOSE TO THE DEFENSE AS SOON AS POSSIBLE.

10:18AM 17 THE TWO SIGNIFICANT BATCHES OF DISCOVERY THAT ARE STILL
10:18AM 18 OUTSTANDING OR WERE RECENTLY OUTSTANDING, ONE WAS A PORTION OF
10:18AM 19 A BATCH OF ABOUT 250,000 DOCUMENTS PRODUCED BY THERANOS SHORTLY
10:18AM 20 BEFORE IT CEASED OPERATIONS.

10:18AM 21 THE GOVERNMENT HAS BEEN UNDERGOING A FILTER TEAM OR TAINT
10:19AM 22 REVIEW OF THOSE DOCUMENTS, AND WE'VE PRODUCED HALF OF THOSE
10:19AM 23 DOCUMENTS A FEW WEEKS AGO TO THE DEFENSE AND MORE RECENTLY
10:19AM 24 WE'VE PRODUCED THE OTHER HALF SO THE DEFENSE NOW HAS ALL OF
10:19AM 25 THOSE MATERIALS.

10:19AM 1 I SHOULD NOTE THAT THE SECOND HALF THAT WE PRODUCED THE
10:19AM 2 GOVERNMENT HAS NOT COMPLETED ITS FILTER REVIEW YET SO THE TRIAL
10:19AM 3 TEAM DOES NOT HAVE ACCESS TO ANY OF THESE DOCUMENTS YET, BUT
10:19AM 4 WE'VE PROVIDED THEM TO THE DEFENSE IN THE INTEREST OF
10:19AM 5 EFFICIENCY AND SO THAT THEY CAN BEGIN REVIEWING IN TRIAL
10:19AM 6 PREPARATION.

10:19AM 7 THE OTHER OUTSTANDING LARGE BATCH OF DISCOVERY IS
10:19AM 8 SOMETHING THAT HAS RECENTLY COME INTO THE GOVERNMENT'S
10:19AM 9 POSSESSION. IT'S A LARGE HARD DRIVE. I UNDERSTAND THAT A LOT
10:19AM 10 OF THE CONTENT WILL CONSIST OF VIDEO FILES, MARKETING MATERIALS
10:19AM 11 MADE BY OR AT THE DIRECTION OF THERANOS. WE ARE PREPARING TO
10:19AM 12 PRODUCE THAT TO THE DEFENSE AS WELL. THE ONLY HOLDUP THERE IS
10:19AM 13 OBTAINING THE HARDWARE NECESSARY TO LOAD IT AND ACTUALLY
10:19AM 14 PROVIDE IT TO THE DEFENSE.

10:19AM 15 SO THERE AGAIN OUR PLAN IS TO GIVE IT TO THE DEFENSE
10:19AM 16 BEFORE WE'VE HAD A CHANCE TO REVIEW IT TO MAKE SURE THAT THEY
10:20AM 17 HAVE IT AS SOON AS POSSIBLE.

10:20AM 18 THE COURT: AND IS THIS COPY, IS THAT GOING TO BE
10:20AM 19 JUST A COPY, IF YOU WILL, AS OPPOSED TO GOING THROUGH ANY
10:20AM 20 PROPRIETARY SOFTWARE THAT THE GOVERNMENT USES TO DOWNLOAD OR
10:20AM 21 DISCOVERY?

10:20AM 22 I ASK THAT QUESTION BECAUSE YOU KNOW THERE ARE SOMETIMES
10:20AM 23 ISSUES ABOUT, WELL, YOU KNOW, THE GOVERNMENT PROTOCOL IS
10:20AM 24 DIFFERENT THAN WHAT A DEFENDANT MIGHT HAVE.

10:20AM 25 MR. BOSTIC: CORRECT, YOUR HONOR. SO IN THIS CASE

10:20AM 1 THE FILES THEMSELVES CAME FROM A THIRD PARTY SO THEY'RE IN
10:20AM 2 WHATEVER FORMAT THAT THIRD PARTY USED. I DON'T KNOW STANDING
10:20AM 3 HERE TODAY WHAT FORMAT THAT IS.

10:20AM 4 WE'LL LOOK AT IT WHEN WE GET IT AND MAKE A DETERMINATION
10:20AM 5 AS TO WHETHER IT'S MORE EFFICIENT FOR THE GOVERNMENT TO PROCESS
10:20AM 6 IT AND PRODUCE IT TO THE DEFENSE WITH METADATA AS WE WOULD WITH
10:20AM 7 OTHER PRODUCTIONS OR TO SIMPLY COPY THE DATA AND GIVE IT TO
10:20AM 8 THEM IN THE SAME FORM THAT WE HAVE, AND WE WILL ALSO CONFIRM
10:20AM 9 WITH THEM TO DETERMINE THEIR PREFERENCES.

10:20AM 10 THE COURT: OKAY. THANK YOU FOR THE UPDATE.

10:20AM 11 WHAT SHOULD I KNOW FROM THE DEFENSE ABOUT YOUR MOTION?

10:20AM 12 MR. WADE: WELL, YOUR HONOR, GIVEN THAT THE COURT
10:21AM 13 HAS MADE A DECISION TO EXPEDITE OUR JOINT RECOMMENDATION TO
10:21AM 14 TRIAL, MAYBE THEN AN ORDER IS NEEDED TO TRY TO MOVE THINGS
10:21AM 15 ALONG AND TO HELP THE GOVERNMENT IN OBTAINING THE AGENCY
10:21AM 16 MATERIALS THAT WE NEED.

10:21AM 17 THE DOCUMENTS THAT WE'RE SEEKING ARE AT THE CORE OF THE
10:21AM 18 CASE. THE -- AND THEY'RE NECESSARY FOR OUR PREPARATION FOR
10:21AM 19 TRIAL.

10:21AM 20 A SIGNIFICANT ALLEGATION IN THE INDICTMENT IS THE
10:21AM 21 GOVERNMENT'S ALLEGATION THAT THERANOS'S TESTS WERE UNRELIABLE
10:21AM 22 AND INACCURATE.

10:21AM 23 THE GOVERNMENT APPEARS TO WANT TO BUILD ITS CASE ON
10:21AM 24 INFORMATION THAT IT RECEIVED FROM CMS AND FROM CMS WITNESSES.

10:21AM 25 THEY'VE SOUGHT TESTIMONY FROM THREE WITNESSES, AND THEY

10:21AM 1 RECEIVED HUNDREDS OF THOUSANDS OF PAGES OF DOCUMENTS AND
10:21AM 2 TERABYTES OF DATA.

10:21AM 3 ANOTHER CENTRAL ALLEGATION IN THE CASE RELATES TO ALLEGED
10:21AM 4 MISREPRESENTATIONS BY MS. HOLMES AND MR. BALWANI REGARDING THE
10:22AM 5 NEED FOR FDA APPROVAL OF THERANOS TECHNOLOGY.

10:22AM 6 HERE AGAIN THE GOVERNMENT APPEARS POISED TO BUILD ITS CASE
10:22AM 7 ON INFORMATION AND TESTIMONY IT OBTAINED FROM THE FDA.

10:22AM 8 THE GOVERNMENT BY ALL ACCOUNTS HAD NEARLY UNFETTERED
10:22AM 9 ACCESS TO THOSE AGENCIES. THEY OBTAINED INFORMATION WITHOUT A
10:22AM 10 SUBPOENA, SEEMINGLY AT WILL.

10:22AM 11 THERE'S NO INDICATION IN THE RECORD THAT IS BEFORE THE
10:22AM 12 COURT THAT THERE WAS EVER ANY RESISTANCE TO ANY REQUEST MADE BY
10:22AM 13 THE GOVERNMENT AND THAT RESISTANCE DIDN'T MANIFEST ITSELF UNTIL
10:22AM 14 DEFENSE REQUEST FOR INFORMATION THAT THE GOVERNMENT DID NOT
10:22AM 15 GATHER WERE PASSED THROUGH.

10:22AM 16 THEN SUDDENLY THE REGULATORY HAZE SORT OF APPEARS IN FRONT
10:22AM 17 OF ALL OF THESE REQUESTS AND THE OBSTACLES ARE PRESENTED AND
10:23AM 18 DELAY RESULTS.

10:23AM 19 AS THE COURT KNOWS, BECAUSE YOU NOTED AT THE START OF THE
10:23AM 20 HEARING, THE MOUNTAIN OF PAPER THAT YOU'VE REVIEWED IN ADVANCE
10:23AM 21 OF THIS HEARING. FRANKLY, WE ARE SURPRISED YOU DIDN'T WANT THE
10:23AM 22 WEEKEND TO REVIEW IT AND WANTED TO ADVANCE THE HEARING.

10:23AM 23 BUT AS YOU KNOW FROM THAT, THERE HAVE BEEN SUBSTANTIAL
10:23AM 24 DELAYS IN OUR ABILITY TO ACCESS THAT MATERIAL. MR. BALWANI'S
10:23AM 25 PLEADING SETS FORTH TEN MONTHS OF EFFORTS TO TRY AND GET THAT

1 MATERIAL IN THE RELATED PROCEEDING.

2 WE'RE NOT A PARTY TO THE S.E.C. PROCEEDING. WE'VE BEEN
3 TRYING TO GET IT FOR SIX MONTHS.

4 THE GOVERNMENT, THANKFULLY RECENTLY, ON THE EVE OF OUR
5 INDICATION THAT WE WERE GOING TO FILE A MOTION RELAYED THESE
6 REQUESTS TO CMS AND THE FDA AND AS VOLUNTARILY REQUESTS.

7 THE LAW REQUIRES MORE. THIS IS AN OBLIGATION. SANTIAGO
8 AND BRYAN ARE CLEAR. THE NINTH CIRCUIT LAW IS CLEAR. WHEN THE
9 GOVERNMENT IS ABLE TO GO IN AND GET ACCESS TO AGENCY DOCUMENTS
10 IN THIS WAY, THEY'RE WITHIN THE CUSTODY, POSSESSION, AND
11 CONTROL OF THE PROSECUTION TEAM, AND THEY HAVE TO GET MATERIALS
12 THAT ARE NECESSARY TO THE PREPARATION OF THE DEFENSE AND BRADY
13 MATERIAL. THE LAW IS UNAMBIGUOUS IN THAT REGARD.

14 SO WE APPRECIATE THE GOOD FAITH EFFORTS OF THE GOVERNMENT
15 TO RECOGNIZE THE VALIDITY OF OUR SIX REQUESTS.

16 THE COURT: AND THOSE SIX REQUESTS, I THINK, WERE
17 ADVANCED TO THE AGENCIES?

18 MR. BOSTIC: CORRECT, YOUR HONOR.

19 THE COURT: VERBATIM REQUESTS AS I UNDERSTAND IT.

20 MR. BOSTIC: THAT'S CORRECT, YOUR HONOR.

21 MR. WADE: THEY WERE, AND WE APPRECIATE THAT. AND
22 WE ALSO APPRECIATE THAT THE GOVERNMENT MAY NOT BE RECEIVING AS
23 GOOD A CUSTOMER SERVICE WITH RESPECT TO THE DEFENSE REQUEST AS
24 THEY RECEIVED WITH RESPECT TO THEIR OWN.

25 THAT'S WHY A COURT ORDER IS NEEDED HERE TO PROMPT THE

10:24AM 1 AGENCIES TO MEET THE OBLIGATIONS AND LET THE GOVERNMENT SATISFY
10:24AM 2 THEIR RULE 16 REQUIREMENTS.

10:24AM 3 THE COURT: SO LET ME ASK -- PARDON ME FOR
10:25AM 4 INTERRUPTING YOU. BUT LET ME ASK, I'M CURIOUS ABOUT A COUPLE
10:25AM 5 OF THINGS.

10:25AM 6 FIRST OF ALL, PARALLEL PROCEEDINGS HERE, WE KNOW THAT,
10:25AM 7 MR. BALWANI'S S.E.C. PROCEEDING, AND I THINK SOME OF THE
10:25AM 8 RESPONSES FROM THE AGENCIES SEEM TO SUGGEST, AND I'M GETTING A
10:25AM 9 LITTLE AHEAD HERE, SEEM TO SUGGEST THAT IN RESPONSE TO
10:25AM 10 MS. HOLMES'S REQUEST, I ALMOST READ IT, MR. BOSTIC, YOU CAN
10:25AM 11 HELP ME ON THIS, I ALMOST READ THE RESPONSE, I THINK IT'S A
10:25AM 12 JUNE 10TH AND A JUNE 7 LETTER FROM FDA AND CMS RESPECTIVELY,
10:25AM 13 THEY ALSO SEEM TO SAY THAT WE'RE GOING TO PROVIDE MR. BALWANI
10:25AM 14 INFORMATION PURSUANT TO HIS CIVIL S.E.C. RESPONSES.

10:25AM 15 AND THE RESPONSE TO MS. HOLMES'S REQUEST ALMOST SEEMS TO
10:25AM 16 SAY SEE BALWANI. MY SENSE IS YOU HAVE SOME OBJECTION TO THAT
10:26AM 17 BECAUSE YOU TOLD ME IN YOUR PLEADINGS YOU'RE NOT A PARTY TO
10:26AM 18 THAT AND YOU WOULD LIKE SOME ANSWERS SPECIFICALLY TO YOUR
10:26AM 19 REQUEST.

10:26AM 20 MR. WADE: OUR POSITION IS SIMPLE. IF YOU BACK UP A
10:26AM 21 STEP, YOUR HONOR, AT THE START OF THE INVESTIGATION THE
10:26AM 22 GOVERNMENT SENT A PRESERVATION NOTICE TO THESE TWO AGENCIES AND
10:26AM 23 SAID PRESERVE EVERYTHING --

10:26AM 24 THE COURT: NO, I UNDERSTAND.

10:26AM 25 MR. WADE: -- RELATING TO THERANOS.

10:26AM 1 IF IT'S EASIER TO GIVE US EVERYTHING RELATING TO THERANOS
10:26AM 2 AND AVOID ALL OF THE REVIEW THAT THEY COMPLAIN ABOUT, WE'RE
10:26AM 3 HAPPY TO TAKE THAT AND DO THE WORK.

10:26AM 4 BUT NOW THEIR POSITION -- THE POSITIONS OF THE FDA AND CMS
10:26AM 5 DIFFER SOMEWHAT, BUT THEY DON'T TAKE OUR REQUEST AND SAY WE'LL
10:26AM 6 COMPLY WITH THEM. THEY TAKE OUR REQUESTS AND SAY WE'LL DO
10:26AM 7 EFFORTS THAT WE CONSIDER TO BE REASONABLE. WE'LL DECIDE WHAT
10:26AM 8 WE THINK IS RELEVANT, AND WE WILL RESPOND TO THOSE REQUESTS
10:26AM 9 ACCORDINGLY.

10:26AM 10 IN FACT, IF YOU LOOK AT THE FDA REQUEST, IT MAKES -- THE
10:26AM 11 FDA LETTER OF JUNE 7TH, IT MAKES CLEAR THAT IT DOESN'T THINK
10:26AM 12 THAT MUCH OF WHAT WE SEEK IS RELEVANT, IT'S NOT CLEAR WHAT
10:27AM 13 THEY'RE GATHERING, IT'S NOT CLEAR WHICH CUSTODIANS THEY'RE
10:27AM 14 LOOKING AT.

10:27AM 15 FRANKLY, IT'S NOT CLEAR THAT THEY'RE EVEN GOING TO RESPOND
10:27AM 16 TO MANY OF OUR REQUESTS.

10:27AM 17 THE COURT: WELL, LET'S START WITH THE FDA. THEY
10:27AM 18 TALK ABOUT THAT THEY NEED EITHER A WAIVER OR A PROTECTIVE ORDER
10:27AM 19 OR BOTH FROM THERANOS, THE ASSIGNEE OF THERANOS.

10:27AM 20 WHAT IS THE LATEST ON THAT?

10:27AM 21 MR. BOSTIC: SO, YOUR HONOR, NOT TO INTERRUPT.

10:27AM 22 THE COURT: YES. NO, PLEASE.

10:27AM 23 MR. BOSTIC: MY UNDERSTANDING OF THE STATUS THERE IS
10:27AM 24 THAT MR. BALWANI'S COUNSEL HAS BEEN ABLE TO OBTAIN A WAIVER
10:27AM 25 THAT PERMITS THE AGENCY TO PRODUCE IN THE CIVIL CASE.

10:27AM 1 I HAVE NOT HEARD THAT MR. BALWANI'S COUNSEL HAS BEEN ABLE
10:27AM 2 TO OBTAIN THAT WAIVER APPLYING TO THE CRIMINAL CASE. I WOULD
10:27AM 3 IMAGINE THAT IT MIGHT BE THE SAME ANALYSIS FOR THE ASSIGNEE,
10:27AM 4 BUT I HAVE NOT HAD THOSE CONVERSATIONS WITH THE ASSIGNEE.

10:27AM 5 THE COURT: IT SOUNDS LIKE PER THEIR LETTER THAT
10:27AM 6 MIGHT BE HELPFUL.

10:27AM 7 MR. WADE: YOUR HONOR, THE DEFENSE HAS NO OBLIGATION
10:27AM 8 TO DO ANYTHING FOR THE GOVERNMENT TO MEET ITS RULE 16
10:27AM 9 OBLIGATIONS. THEY HAVE AN OBLIGATION TO MEET THEIR RULE 16
10:28AM 10 OBLIGATIONS. WE WANT TO DO WHATEVER WE CAN TO MEET AND CONFER.

10:28AM 11 THE COURT: HOW CAN I HELP YOU?

10:28AM 12 MR. WADE: AN ORDER FROM THE COURT.

10:28AM 13 THE COURT: CAN I ORDER THEM TO DO A WAIVER?

10:28AM 14 MR. WADE: YOU CAN ORDER THEM TO PRODUCE THE
10:28AM 15 DOCUMENTS.

10:28AM 16 THE COURT: THAT'S NOT MY QUESTION. MY QUESTION WAS
10:28AM 17 IF THEY NEED A WAIVER, LET'S GET THE WAIVER. LET'S JUST GET IT
10:28AM 18 DONE.

10:28AM 19 MR. WADE: THEY WON'T NEED A WAIVER, YOUR HONOR,
10:28AM 20 RESPECTIVELY.

10:28AM 21 MANY OF THE BARRIERS THEY'RE ERECTING ARE BECAUSE THEY
10:28AM 22 DON'T HAVE A COURT ORDER THAT IS REQUIRING THEM. IT'S NOT
10:28AM 23 CLEAR TO US THAT THEY ACTUALLY -- THAT THE BASES THAT THEY'RE
10:28AM 24 PROVIDING ARE A PROPER BASIS TO NOT MEET RULE 16 OBLIGATIONS,
10:28AM 25 WHICH CLEARLY THESE AGENCIES FALL WITHIN RULE 16 GIVEN HOW

10:28AM 1 CENTRAL THEY ARE AND THE ACCESS AND KNOWLEDGE OF THE GOVERNMENT
10:28AM 2 WITH RESPECT TO THIS. BUT IF THE COURT ISSUES AN ORDER THAT --
10:28AM 3 THE COURT: I UNDERSTAND THAT. LET'S PARSE THROUGH
10:28AM 4 THIS THEN, LET'S PARSE THROUGH THIS.
10:28AM 5 MR. WADE: YES.
10:28AM 6 THE COURT: THEY'RE SAYING, THE FDA, -- I'M LOOKING
10:28AM 7 AT THE LETTER, AND THIS IS 79-4, DOCUMENT 79-4, ECF PAGE 4 OF
10:29AM 8 5, THE SECOND PARAGRAPH IN THE MIDDLE, IT TALKS ABOUT -- AND
10:29AM 9 THIS IS A LETTER AUTHORED FROM MARCI, M-A-R-C-I, V. NORTON,
10:29AM 10 N-O-R-T-O-N, SENIOR COUNSEL, AND SHE SAYS IN THE LETTER THAT
10:29AM 11 THE FDA IS PROHIBITED FROM RELEASING TRADE SECRET AND
10:29AM 12 CONFIDENTIAL, COMMERCIAL AND FINANCIAL INFORMATION, CCI,
10:29AM 13 REGARDING DEVICES OBTAINED, ET CETERA, ET CETERA. TRADE
10:29AM 14 SECRETS.
10:29AM 15 SHE SUGGESTS THAT AN ASSIGNEE PROVIDE A WRITTEN WAIVER
10:29AM 16 PERMITTING THEM TO DO THAT.
10:29AM 17 THAT SEEMS PRETTY SIMPLE TO DO. MAYBE I'M MISSING
10:29AM 18 SOMETHING. CAN'T WE GET THAT?
10:29AM 19 MR. WADE: WE HAVE NO ABILITY TO GET THAT, YOUR
10:29AM 20 HONOR.
10:29AM 21 THE COURT: HAVE YOU MADE A REQUEST FOR THAT?
10:29AM 22 MR. WADE: AGAIN, WE HAVE NOT MADE A REQUEST.
10:29AM 23 PREVIOUSLY WHEN THE GOVERNMENT OBTAINED ALL OF THE MATERIALS IT
10:29AM 24 WANTED DURING THE INVESTIGATION, THE GOVERNMENT WENT TO
10:29AM 25 THERANOS AND GOT SUCH A WAIVER, AND IF THE GOVERNMENT FEELS

10:30AM 1 THAT'S THE GATEWAY TO MEETING ITS RULE 16 OBLIGATIONS AND
10:30AM 2 CUTTING THROUGH THIS, IT'S WELCOME TO DO SO.

10:30AM 3 YOUR HONOR, I WOULD RESPECTFULLY SAY AN ORDER FROM THIS
10:30AM 4 COURT THAT REQUIRES THEM TO PRODUCE DOCUMENTS THAT ARE
10:30AM 5 RESPONSIVE TO THESE REQUESTS WOULD OBTAIN THE NEED FOR SUCH A
10:30AM 6 WAIVER FROM THERANOS. WE COULD ALSO AGREE TO A PROTECTIVE
10:30AM 7 ORDER THAT COULD BE IN PLACE IN THIS CASE. I'M SURE WE CAN
10:30AM 8 EASILY MEET AND CONFER WITH THE GOVERNMENT TO FIND SOMETHING.

10:30AM 9 THE COURT: I THOUGHT A PROTECTIVE ORDER WOULD BE IN
10:30AM 10 PLACE SPECIFICALLY IN REGARDS TO CMS. THEY WANT A PROTECTIVE
10:30AM 11 ORDER FOR SOME OF THAT MATERIAL, AND THAT WAS GOING TO BE MY
10:30AM 12 NEXT QUESTION WHETHER OR NOT THERE HAD BEEN A MEET AND CONFER
10:30AM 13 TO ACCOMPLISH THIS.

10:30AM 14 I RECOGNIZE YOU'RE SAYING IT'S BEEN MONTHS, IT'S BEEN SIX
10:30AM 15 MONTHS SINCE WE RECEIVED THIS, BUT I'D LIKE TO HELP YOU OUT AND
10:30AM 16 GET SOME JOINT EFFORT HERE. YOU'RE ALL OF COMMON PURPOSE TO
10:30AM 17 GET THIS DONE.

10:30AM 18 MR. WADE: WE APPRECIATE THAT, YOUR HONOR.

10:30AM 19 THE COURT: LET'S GET IT DONE.

10:30AM 20 MR. WADE: AND WE WOULD LIKE TO GET IT DONE, TOO.

10:31AM 21 AGAIN, TO BE CLEAR, WE THINK THAT THE BEST WAY TO DO THAT
10:31AM 22 IS TO GET AN ORDER FROM THE COURT.

10:31AM 23 RESPECTFULLY, WE'VE DEALT WITH MANY FEDERAL AGENCIES IN
10:31AM 24 OUR PRACTICE. AS YOU KNOW, WE SIT IN OUR NATION'S CAPITOL, AND
10:31AM 25 OBSTACLES REMAIN IF A COURT DOES NOT MAKE CLEAR THAT IT'S A

10:31AM 1 LEGAL OBLIGATION OF THE UNITED STATES GOVERNMENT TO PROVIDE
10:31AM 2 THESE MATERIALS.

10:31AM 3 I WILL REPRESENT TO THE COURT WE WILL MEET AND CONFER
10:31AM 4 DILIGENTLY AND PROVIDE WHATEVER FLEXIBILITY IS WITHIN OUR
10:31AM 5 CONTROL TO GET ACCESS TO THESE DOCUMENTS. PROTECTIVE DOCUMENTS
10:31AM 6 ARE WITHIN OUR CONTROL. WE'RE HAPPY TO PROVIDE A PROTECTIVE
10:31AM 7 ORDER THAT COVERS THE CMS MATERIALS, THE FDA MATERIALS OR ANY
10:31AM 8 OF THE OTHER MATERIALS THAT WE NEED WITHIN RULE 16.

10:31AM 9 BUT THAT DOESN'T RELIEVE THE GOVERNMENT OF ITS OBLIGATION
10:31AM 10 TO GET THE MATERIALS. THE GOVERNMENT RIGHT NOW REFUSES TO
10:31AM 11 ACCEPT THAT OBLIGATION. THEY'VE GOT ALL OF THE MATERIALS THAT
10:31AM 12 THEY WANTED.

10:31AM 13 THE COURT: YOU'RE REFUSING YOUR OBLIGATION, YOUR
10:32AM 14 RULE 16 OBLIGATION?

10:32AM 15 MR. BOSTIC: I WOULD DISAGREE WITH THAT
10:32AM 16 CHARACTERIZATION, YOUR HONOR.

10:32AM 17 MR. WADE: WELL, I THINK THE FACTS HERE SUGGEST
10:32AM 18 OTHERWISE. BRYAN AND -- AGAIN, THE GOVERNMENT IS TRYING TO DO
10:32AM 19 WHAT THE COURT SUGGESTS, WHICH IS THAT THEY ARE TRYING TO DO
10:32AM 20 WHATEVER THEY CAN ON A VOLUNTARY BASIS TO GET THE MATERIAL THAT
10:32AM 21 THEY WANT.

10:32AM 22 WHEN THE GOVERNMENT ON A VOLUNTARY BASIS WENT TO GET
10:32AM 23 INFORMATION, THAT WAS -- THAT IT WANTED FOR ITS INVESTIGATION,
10:32AM 24 THE DOORS WERE WIDE OPEN AND THE SHELVES WERE FULL AND THEY
10:32AM 25 COULD TAKE WHATEVER THEY WANTED.

10:32AM 1 THERE'S NO INDICATION THAT THERE WERE ANY OBSTACLES THAT
10:32AM 2 WERE MEANINGFUL THAT PREVENTED THEM FROM GETTING INFORMATION.

10:32AM 3 THERE SHOULD BE NO REASON THAT THE SAME ISN'T THE -- SAME
10:32AM 4 ISN'T TRUE FOR THESE REQUESTS.

10:32AM 5 THE ONLY REASON THAT THAT IS TRUE IS BECAUSE THESE
10:32AM 6 AGENCIES KNOW THAT THESE ARE DEFENSE REQUESTS. THEY'RE NOT
10:32AM 7 WILLING TO PROVIDE THE SAME LEVEL OF COOPERATION, WHICH IS NOT
10:32AM 8 FAIR, YOUR HONOR.

10:32AM 9 THE COURT: I APPRECIATE THAT. SO ONE THOUGHT I HAD
10:32AM 10 AFTER I READ YOUR INFORMATION AND THE GOVERNMENT'S INFORMATION
10:32AM 11 AND RECOGNIZING THAT MR. BOSTIC AND HIS TEAM HAS PUT FORWARD
10:33AM 12 THESE REQUESTS PURSUANT, VERBATIM TO THE SIX CATEGORIES THAT
10:33AM 13 THE DEFENSE HAS REQUESTED, AND I APPRECIATE THAT. I'M SURE YOU
10:33AM 14 DO, TOO.

10:33AM 15 MR. WADE: WE DO.

10:33AM 16 THE COURT: AND I GUESS THE RESULT IS AT LEAST THE
10:33AM 17 JUNE 7TH, THE JUNE 10TH LETTER FROM THESE TWO AGENCIES.

10:33AM 18 A THOUGHT I HAD ABOUT GOING FORWARD WAS TO GIVE THE
10:33AM 19 GOVERNMENT, YOU, PERHAPS 60, 70 DAYS TO SEE WHAT IS FORTHCOMING
10:33AM 20 AND IF -- AND HAVE ANOTHER STATUS. AND IF THERE'S
10:33AM 21 INSUFFICIENCY, DEFICIENCY OF THE MATERIAL, THEN MAYBE WE SET AN
10:33AM 22 EVIDENTIARY HEARING AND ASK MS. NORTON -- LET'S SEE, WHO IS THE
10:33AM 23 AUTHOR OF THIS CMS LETTER? -- KAREN DYER, D-Y-E-R, TO COME TO
10:33AM 24 COURT AND TELL US WHY THEY HAVEN'T COMPLIED.

10:34AM 25 IT TAKES A LITTLE MORE TIME, AND I REALIZE TIME IS

10:34AM 1 PRECIOUS WHEN YOU'RE PREPARING THE DEFENSE. BUT MY SENSE WAS
10:34AM 2 THAT THERE WAS AN ENGAGEMENT OF AT LEAST A DELIVERY OF THE SIX
10:34AM 3 CATEGORIES. THE FDA, CMS HAVE SAID, OKAY, WE'RE GOING TO START
10:34AM 4 ROLLING THIS OUT. I HAVE SOME QUESTIONS ABOUT -- I THINK FDA
10:34AM 5 SAID IT WILL TAKE US A MONTH TO GET THAT OUT. THE DATE OF
10:34AM 6 THEIR LETTER WAS JUNE 7TH, AND SO WE SHOULD EXPECT DELIVERY IF
10:34AM 7 WE HOLD THEM TO THAT TO JULY 7, NEXT WEEK.

10:34AM 8 BUT I HAD A NOTE TO MYSELF HERE THAT SEEMS TOO LONG. EASY
10:34AM 9 FOR ME TO SAY BECAUSE WE'RE HERE AND WE'RE NOT IN THEIR
10:34AM 10 ARCHIVES. BUT I DO WANT TO ADVANCE THIS, THE DISCOVERY, IN
10:34AM 11 SOME MANNER.

10:34AM 12 THE EASIEST THING I COULD DO TODAY IS TO JUST SIGN A PIECE
10:34AM 13 OF PAPER, SCRATCH SOMETHING OUT AND SAY GIVE IT TO ME. I
10:34AM 14 APPRECIATE THAT.

10:34AM 15 THEY'VE RAISED SOME CONCERNS THAT I THINK HAVE SOME
10:34AM 16 LEGITIMACY. THEY HAVE SOME ATTORNEY-CLIENT PRIVILEGE QUESTIONS
10:34AM 17 ABOUT SOME DOCUMENTS. THEY HAVE SOME OTHER ISSUES ABOUT
10:35AM 18 PRIVILEGED INFORMATION THAT I THINK THEY'RE ENTITLED TO ASSERT
10:35AM 19 AT LEAST A FACIAL OBJECTION TO, AND WE SHOULD HOLD THEM TO THAT
10:35AM 20 AND ALLOW THEM THAT OPPORTUNITY.

10:35AM 21 THEN IF NEEDED, WE CAN COME BACK AND THEY CAN TELL US SO
10:35AM 22 THAT THEY CAN DEVELOP A PRIVILEGE LOG OR WHATEVER THEY NEED TO
10:35AM 23 DO TO SEGREGATE INFORMATION AS TO WHY THEY'RE NOT GIVING IT TO
10:35AM 24 THE DEFENSE. I APPRECIATE THAT.

10:35AM 25 LET ME JUST TELL YOU THAT'S JUST AN OVERALL THOUGHT I HAD

10:35AM 1 TO GIVE THEM THAT TIME TO GET IT DONE. AND MR. BOSTIC AND
10:35AM 2 MR. SCHENK AND MR. LEACH WOULD TELL THEM THAT THE COURT IS
10:35AM 3 ADVISING THEM TO PROCEED WITH AS MUCH SPEED AS THEY CAN GIVE
10:35AM 4 BECAUSE I EXPECT THEM AND I'LL GIVE THEM AN OPPORTUNITY TO
10:35AM 5 VOLUNTARILY TO PRODUCE THE INFORMATION. AND IN THE INTERIM THE
10:35AM 6 COURT IS GOING TO WORK ON AN ORDER THAT WOULD BE FORTHCOMING,
10:35AM 7 AND IT WOULD PROBABLY HAVE A SHORT TIMELINE THEREAFTER IF I'M
10:35AM 8 GOING TO GIVE THEM 60 DAYS. IT WOULD PROBABLY BE A SHORT LEASH
10:36AM 9 AFTER THAT TO COMPLY WITH THE BALANCE OF THINGS. THAT'S AN
10:36AM 10 OVERALL THOUGHT THAT I JUST HAD.

10:36AM 11 MR. WADE: YOUR HONOR, I APPRECIATE THE IMPULSE TO
10:36AM 12 WANT TO GIVE THE AGENCY SOME FLEXIBILITY TO BE COMPLIANT, AND I
10:36AM 13 APPRECIATE -- AND I APPRECIATE THE HESITATION IN WANTING TO
10:36AM 14 JUST IMPOSE AN ORDER ON A CO-EQUAL BRANCH OF GOVERNMENT, I
10:36AM 15 UNDERSTAND THAT.

10:36AM 16 THE COURT: YOU KNOW -- NO, I HAVE NO HESITATION
10:36AM 17 ABOUT THAT.

10:36AM 18 MR. WADE: EVEN BETTER, YOUR HONOR.

10:36AM 19 THE COURT: BUT THERE IS AN ENGAGEMENT GOING ON
10:36AM 20 HERE. THEY SAID THEY WERE GOING TO ROLL SOME THINGS OUT. I
10:36AM 21 UNDERSTAND YOUR POSITION WHEN THEY SAID I THINK IT'S A
10:36AM 22 REASONABLE RESPONSE TO THE REQUEST. I DON'T KNOW WHAT THAT
10:36AM 23 MEANS.

10:36AM 24 I UNDERSTAND YOU SAY, WELL, THIS ISN'T RELEVANT, THIS
10:36AM 25 ISN'T MATERIAL. WELL, THAT'S NOT THEIR CALL, AND THEY DON'T

10:36AM 1 GET TO SAY THAT. I APPRECIATE THAT, AND I'M NOT TAKING THEM AT
10:36AM 2 PERHAPS -- PERHAPS I'M JUST TAKING IT FACIALLY THAT THEY'RE
10:37AM 3 OPINING THAT WE DON'T THINK IT'S RELEVANT. WE DON'T THINK IT'S
10:37AM 4 MATERIAL.

10:37AM 5 THEY DON'T GET TO MAKE THAT CALL. THEY CAN EXPRESS THEIR
10:37AM 6 OPINION ABOUT IT, BUT THEY CAN'T WITHHOLD SOMETHING JUST
10:37AM 7 BECAUSE THEY THINK IT'S NOT HELPFUL. THEY HAVE TO PROVIDE IT,
10:37AM 8 AND THEN WE HAVE A CONVERSATION, AND I THINK THE JUDGE IS THE
10:37AM 9 PERSON THAT GETS TO MAKE THAT CALL LAST TIME I CHECKED SO
10:37AM 10 THAT'S HOW THAT SHOULD PROCEED.

10:37AM 11 THAT'S WHY I'M SAYING THIS PROCESS HAS BEEN ENGAGED NOW,
10:37AM 12 AND I CAN ISSUE AN ORDER TODAY, MR. BOSTIC, BUT I'D LIKE TO
10:37AM 13 GIVE YOU AN OPPORTUNITY TO SHARE MY THOUGHTS WITH THE AGENCIES
10:37AM 14 TO TELL THEM I EXPECT PRODUCTION. THEY'RE ENTITLED TO IT. TO
10:37AM 15 WHATEVER THEY'RE ENTITLED TO, THEY SHOULD GET IT AS SOON AS
10:37AM 16 POSSIBLE.

10:37AM 17 DO WE NEED -- IS THERE ANY OBJECTION TO -- FROM THE
10:37AM 18 PARTIES SPECIFICALLY ABOUT SPECIFIC INFORMATION? I'M TRYING TO
10:37AM 19 PARSE THAT OUT WHAT THEY'RE SAYING.

10:38AM 20 MR. WADE: TO BE HONEST, IT'S A LITTLE OPAQUE HERE,
10:38AM 21 YOUR HONOR.

10:38AM 22 THE COURT: RIGHT. I AGREE. I AGREE.

10:38AM 23 MR. WADE: AND WE RECEIVED THESE LETTERS JUST A
10:38AM 24 SHORT TIME AGO. WE HAVE BEEN MEETING AND CONFERRING ON AN
10:38AM 25 ONGOING BASIS FOR MONTHS. WE RECEIVED THE GOVERNMENT'S

10:38AM 1 POSITION JUST A FEW WEEKS AGO, AND IN RECEIVING THAT IT'S
10:38AM 2 REALLY HARD TO UNDERSTAND EXACTLY WHAT THEY'RE NECESSARILY
10:38AM 3 AGREEING TO DO.

10:38AM 4 A FEW THINGS STAND OUT, YOUR HONOR. IT APPEARS FROM US,
10:38AM 5 BASED ON THE READING OF THE FDA LETTER, THAT THEY'RE ACTUALLY
10:38AM 6 AGREEING TO PRODUCE DOCUMENTS IN RESPONSE TO ONE OF THE
10:38AM 7 REQUESTS, REQUEST 4. THAT'S OBVIOUSLY IN OUR VIEW NOT
10:38AM 8 SUFFICIENT.

10:38AM 9 TO THE EXTENT THAT THEIR POSITION IS ALL OF THE OTHER
10:38AM 10 CATEGORIES ARE IRRELEVANT, WE SHOULD JUST RESOLVE THOSE ISSUES,
10:38AM 11 PROVIDE THE CLARITY THAT IS NEEDED, AND KEEP THIS ON TRACK. WE
10:38AM 12 HAVE THE SAME GOAL, YOUR HONOR. WE WANT TO BE IN A POSITION TO
10:38AM 13 GET THIS INFORMATION AS QUICKLY AS POSSIBLE. THAT'S WHY WE --
10:38AM 14 WHEN WE SAW THE SIGNIFICANCE OF IT, WE RAISED IT PROMPTLY WITH
10:39AM 15 THE COURT IN THE SPRING SO THAT WE COULD GET THIS RESOLVED
10:39AM 16 BECAUSE WE KNOW THIS MAY TAKE SOME TIME, AND OUR HOPE WOULD BE
10:39AM 17 THAT THE DIRECTION FROM THE COURT THAT THESE SIX REQUESTS ARE
10:39AM 18 MATERIAL TO THE PREPARATION OF THE DEFENSE, THAT THAT DIRECTION
10:39AM 19 FROM THE COURT AND THAT ENCOURAGEMENT OF AN EXPEDITIOUS
10:39AM 20 RESPONSE WOULD BE SUFFICIENT.

10:39AM 21 THEIR LETTER SUGGESTS OTHERWISE. AGAIN, NOT -- THROUGH NO
10:39AM 22 FAULT OF THE GOVERNMENT AS REPRESENTED BY THE LAWYERS WHO ARE
10:39AM 23 SITTING IN THIS ROOM WHO RELAYED THOSE SIX REQUESTS FAITHFULLY
10:39AM 24 THROUGH TO THE AGENCIES.

10:39AM 25 THE AGENCIES HAVE COME BACK WITH A FAIR AMOUNT OF

10:39AM 1 AMBIGUITY. SO I JUST -- MY FEAR ON YOUR APPROACH, WHICH I
10:39AM 2 APPRECIATE, IS WE'RE GOING TO FIND OURSELVES BACK HERE IN
10:39AM 3 60 DAYS IN THE SAME SPOT THAT WE'RE IN NOW.

10:39AM 4 THE COURT: THAT WOULD BE DISAPPOINTING, WOULDN'T
10:39AM 5 IT?

10:39AM 6 MR. WADE: IT WOULD BE VERY DISAPPOINTING. AND IF
10:40AM 7 THAT 60 DAYS CAME WITH THE SUBPOENA POWER OF JUST TO BRING IN
10:40AM 8 THE APPROPRIATE WITNESSES AND TO EXPLORE IN AN EVIDENTIARY
10:40AM 9 HEARING WHY THESE MATERIALS HAVE NOT BEEN GATHERED, FRANKLY,
10:40AM 10 ASSURANCES -- I'M SURE THE COURT SAW IT APPEARS THAT SOME
10:40AM 11 MATERIALS FROM THE CDPH WERE NOT PRESERVED AND MAY HAVE BEEN
10:40AM 12 DESTROYED. THOSE ARE EXCULPATORY MATERIALS FOR MS. HOLMES AND
10:40AM 13 MR. BALWANI. SO WE WANT TO MAKE SURE THAT --

10:40AM 14 THE COURT: WELL, ARE THEY? WE DON'T KNOW IF
10:40AM 15 THEY'RE EXCULPATORY BECAUSE WE DON'T KNOW WHAT THEY ARE. THEY
10:40AM 16 COULD VERY WELL BE. BUT I UNDERSTAND THAT NOTES ARE NOT
10:40AM 17 AVAILABLE NOW, THEY'RE GONE.

10:40AM 18 MR. WADE: WELL, WHAT WE DO KNOW, YOUR HONOR, IS
10:40AM 19 THAT THE LAB INSPECTORS CAME IN AND AUDITED THE LAB AND
10:40AM 20 BASICALLY GAVE A CLEAN BILL OF HEALTH, WHICH WAS KNOWN TO BOTH
10:40AM 21 OF THE DEFENDANTS IN THIS CASE AND IS CLEARLY VERY RELEVANT TO
10:40AM 22 THEIR INTENT AND BELIEF THAT EVERYTHING WAS GOING WELL IN THE
10:40AM 23 LAB.

10:40AM 24 THE COURT: SO THAT'S A FACT THAT THERE'S NOT GOING
10:40AM 25 TO BE MUCH DISPUTE ABOUT, BUT WHAT YOU'RE SAYING IS THAT THE

10:40AM 1 NOTES OF THAT INSPECTION WOULD HAVE BEEN HELPFUL TO DRILL DOWN.

10:40AM 2 MR. WADE: ABSOLUTELY.

10:41AM 3 THE COURT: SURE. OKAY.

10:41AM 4 MR. WADE: AND BRADY MATERIAL WE THINK, YOUR HONOR.

10:41AM 5 THE COURT: WELL, IT SOUNDS LIKE THE EVIDENCE IS NOT

10:41AM 6 GOING TO BE, AND I DON'T WANT TO GET INTO THE EVIDENCE, BUT IT

10:41AM 7 SOUNDS LIKE THERE'S NOT GOING TO BE MUCH DISPUTE THAT THAT

10:41AM 8 AGENCY CAME IN AND GAVE A CLEAN BILL OF HEALTH FOR WHATEVER

10:41AM 9 REASON. THE NOTES THEMSELVES MIGHT HAVE BEEN PART OF

10:41AM 10 ADDITIONAL INFORMATION, BUT ANYHOW, I UNDERSTAND YOUR POINT.

10:41AM 11 LET ME JUST MOVE TO ONE SPECIFIC AREA, AND THIS IS WITH

10:41AM 12 THE S.E.C. APPARENTLY, AS TO THE S.E.C. THE GOVERNMENT HAS

10:41AM 13 AGREED TO MAKE AVAILABLE TO THE DEFENSE THE AGENT NOTES OF

10:41AM 14 WITNESS INTERVIEWS I THINK. I THINK THAT'S WHAT I READ FROM

10:41AM 15 YOUR PLEADINGS.

10:41AM 16 MR. BOSTIC: SO, YOUR HONOR, AS TO AGENT NOTES, FOR

10:41AM 17 EXAMPLE, FBI AGENT NOTES, POSTAL INSPECTOR AGENT NOTES, THE

10:41AM 18 GOVERNMENT'S PLAN AND THE OFFER TO THE DEFENSE IS TO MAKE THOSE

10:41AM 19 AVAILABLE FOR THE DEFENSE'S REVIEW. THE DEFENSE CAN THEN BRING

10:41AM 20 TO OUR ATTENTION ANY MATERIAL FROM THOSE NOTES THAT THEY

10:41AM 21 BELIEVE IS BRADY, AND THEN WE CAN TALK ABOUT PRODUCTION.

10:41AM 22 AS TO THE S.E.C., THE GOVERNMENT, THE PROSECUTION DOESN'T

10:41AM 23 HAVE THE SAME ACCESS TO THE S.E.C.'S NOTES THAT WE DO TO, SAY,

10:42AM 24 THE FBI'S NOTES. FOR THAT REASON WHAT WE'RE IN A POSITION TO

10:42AM 25 OFFER THERE IS THAT WE WILL UNDERTAKE A REVIEW OF THOSE S.E.C.

10:42AM 1 NOTES AS IS TRADITIONALLY OUR OBLIGATION UNDER BRADY, AND TAKE
10:42AM 2 APPROPRIATE STEPS IF BRADY MATERIAL IS IDENTIFIED.

10:42AM 3 THE COURT: AND I THINK THE DEFENSE AGREES WITH
10:42AM 4 THAT?

10:42AM 5 MR. WADE: WE DID. WE'VE MET AND CONFERRED
10:42AM 6 EXTENSIVELY WITH THE GOVERNMENT ON THIS. WE HAVE SOME
10:42AM 7 HESITATION BECAUSE THE GOVERNMENT'S ABILITY TO SPOT A LOT OF
10:42AM 8 MATERIAL, THEIR ABILITY TO SPOT WHAT IS APPROPRIATELY
10:42AM 9 CONSIDERED BRADY BY THE DEFENSE SEEMS TO ME TO BE A PRETTY
10:42AM 10 PRECARIOUS ENDEAVOR.

10:42AM 11 THE COURT: THEY GET EXTENSIVE TRAINING ON THAT.
10:42AM 12 THEY GET EXTENSIVE TRAINING AT THEIR SCHOOLS ON THAT. AND THEY
10:42AM 13 KNOW -- I AM SMILING HERE AND WE ARE ALL SMILING ABOUT THAT,
10:42AM 14 BUT LET ME JUST BE CLEAR, BRADY IS A SERIOUS MATTER. IT'S
10:42AM 15 SOMETHING THAT AT LEAST, AND I KNOW THESE COUNSEL, THEY'VE
10:42AM 16 APPEARED IN FRONT OF ME AND THEY'VE TRIED CASES IN FRONT OF ME,
10:42AM 17 AND MY EXPERIENCE IS THAT THEY KNOW THE BRADY RESPONSIBILITY IS
10:43AM 18 ONGOING AND THEY KNOW THAT, THEY KNOW THAT THE COURTS,
10:43AM 19 PARTICULARLY THIS COURT, TAKE THAT VERY SERIOUSLY, AND THEY
10:43AM 20 RECOGNIZE, AS ALL PROSECUTORS DO, THEY PROCEED AT THEIR OWN
10:43AM 21 PERIL WITH BRADY. IT'S TYPICALLY, AND I'M JUST COMMENTING,
10:43AM 22 IT'S TYPICALLY BETTER TO PROCEED OUT OF AN ABUNDANCE OF CAUTION
10:43AM 23 IN THAT REGARD BECAUSE THEY KNOW, AND NOT JUST THESE LAWYERS,
10:43AM 24 BUT PROSECUTORS ACROSS THE COUNTRY KNOW THAT A BRADY VIOLATION
10:43AM 25 COULD PUT IN JEOPARDY THEIR CASE, AND I THINK THEY'RE TAUGHT

10:43AM 1 THAT AND THEY KNOW THAT FROM EXPERIENCE.

10:43AM 2 I'M SAYING IT ON THE RECORD BECAUSE I JUST WANT EVERYONE
10:43AM 3 TO KNOW IT'S A SERIOUS MATTER.

10:43AM 4 MR. WADE: WE APPRECIATE THAT, YOUR HONOR, AND I IN
10:43AM 5 NO WAY MEANT TO SUGGEST OTHERWISE. WE APPRECIATE THAT THE
10:43AM 6 GOVERNMENT AGREED IN NARROWING THE DISPUTES TO TAKE ON THAT
10:43AM 7 OBLIGATION, AND I THINK IN THE FIRST INSTANCE WE'RE WILLING TO
10:43AM 8 ACCEPT THAT FOR THE MOST PART.

10:43AM 9 THERE IS ONE SPECIFIC SET OF WITNESSES, TWO WITNESSES.

10:44AM 10 THE COURT: YES, YOU'RE GOING TO SPEAK ABOUT
10:44AM 11 CRAIG HALL, BRYAN TOLBERT?

10:44AM 12 MR. WADE: YES. THE ISSUE THAT WE THINK WE'VE MADE
10:44AM 13 A NECESSARY SHOWING THAT BRADY WOULD EXIST WITHIN THOSE NOTES
10:44AM 14 AND COMMUNICATIONS WITH COUNSEL SUCH THAT THAT SHOULD BE
10:44AM 15 PROVIDED TO THE DEFENSE AT THIS TIME.

10:44AM 16 THE COURT: YOU WANT AGENT NOTES, S.E.C. AGENT NOTES
10:44AM 17 AND INTERVIEW OF MEMORANDUM REGARDING THEIR INTERVIEWS AND YOU
10:44AM 18 SUGGEST THAT AFTER REVIEWING THE DEPOSITION TESTIMONY OF THOSE
10:44AM 19 WITNESSES THAT THERE'S SOME INCONSISTENCY THAT YOU THINK MIGHT
10:44AM 20 RAISE AN ISSUE OF BRADY.

10:44AM 21 MR. WADE: AND WANTING TO BE SOMEWHAT DISCRETE AND
10:44AM 22 FAIR TO THE PARTICULAR PEOPLE, I WILL SAY THAT HIGHLY PROBATIVE
10:44AM 23 MATERIAL THAT GOES -- THAT IS CENTRAL TO ONE OF THE COUNTS IN
10:44AM 24 THE INDICTMENT.

10:44AM 25 I THINK WE'VE MADE THE NECESSARY SHOWING, AND IT'S SET

10:44AM 1 FORTH IN THE PLEADINGS, AND THERE'S CLEARLY A DISCREPANCY. IN
10:44AM 2 ONE -- ON ONE OCCASION SOMEONE ADMITTED TO A CRIME UNDER
10:44AM 3 CALIFORNIA LAW. ON ANOTHER OCCASION THEY SAID THE OPPOSITE.
10:45AM 4 THAT'S ABOUT AS DIRECT OF A CONTRADICTION AS CAN EXIST.

10:45AM 5 THE COURT: AND YOU WANT S.E.C. COMMUNICATIONS WITH
10:45AM 6 THEM, THAT IS, EITHER OF THESE WITNESSES AND/OR THEIR COUNSEL?

10:45AM 7 MR. WADE: CORRECT.

10:45AM 8 THE COURT: YOU'RE SUGGESTING E-MAILS OR LETTERS
10:45AM 9 THAT PERHAPS MIGHT SCHEDULE INTERVIEWS OR FOLLOWUP, THAT TYPE
10:45AM 10 OF THING? YOU'RE NOT SEEKING PRIVILEGED INFORMATION.

10:45AM 11 MR. WADE: WE'RE NOT SEEKING PRIVILEGED INFORMATION
10:45AM 12 EXCEPT THAT WE ARE SEEKING NOTES. SO WHETHER -- WE'RE
10:45AM 13 REVIEWING OTHER NOTES IN THE CASE SO I AM ASSUMING THAT THE
10:45AM 14 GOVERNMENT IS NOT TAKING THE POSITION THAT NOTES OF THEIR
10:45AM 15 MEETING WITH THE WITNESSES WOULD BE PRIVILEGED OR AREN'T
10:45AM 16 AVAILABLE FOR PRODUCTION.

10:45AM 17 SO WE'RE NOT SEEKING ANYTHING THAT WE DON'T THINK WE'RE
10:45AM 18 ENTITLED TO UNDER RULE 16 AND BRADY.

10:45AM 19 THE COURT: OKAY.

10:45AM 20 MR. WADE: EVEN IF IT WAS PRIVILEGED, FRANKLY, YOUR
10:45AM 21 HONOR, GIVEN THAT IT'S BRADY, I THINK UNDER NINTH CIRCUIT LAW
10:45AM 22 THOSE CLAIMS WOULD -- THE PRIVILEGE ASSERTIONS WOULD YIELD TO
10:45AM 23 THE GOVERNMENT'S BRADY OBLIGATION.

10:46AM 24 BUT I THINK THE GOVERNMENT HASN'T TAKEN THE POSITION
10:46AM 25 NECESSARILY THAT THOSE MATERIALS ARE PRIVILEGED.

10:46AM 1 IF IT WANTS TO MAKE SOME OFFERING AS TO SOME ALTERNATIVE
10:46AM 2 MEANS TO PROVIDE THAT, WE'RE OPEN TO BEING REASONABLE, BUT IT
10:46AM 3 SEEMS LIKE THE CLEAREST WAY IS TO PROVIDE THE NOTES IN --

10:46AM 4 THE COURT: WELL, YOU'RE ALWAYS GOING TO BE
10:46AM 5 REASONABLE, I KNOW THAT.

10:46AM 6 SO LET ME JUST ADD, MR. BOSTIC, WHAT ABOUT GETTING THAT
10:46AM 7 INFORMATION? CAN YOU SECURE THAT?

10:46AM 8 MR. BOSTIC: YOUR HONOR, I'LL ADDRESS THAT. I DO
10:46AM 9 HAVE SOME POINTS TO MAKE ABOUT THE FDA AND CMS DOCUMENTS AS
10:46AM 10 WELL.

10:46AM 11 THE COURT: WE'LL GET BACK TO THAT.

10:46AM 12 MR. BOSTIC: BUT WHILE WE'RE ON THIS TOPIC, I THINK
10:46AM 13 THE DEFENSE'S PROPOSAL STILL SKIPS A STEP FOR NO REASON. I
10:46AM 14 THINK IT SKIPS A STEP OF THE PROSECUTION REVIEWING THOSE
10:46AM 15 MATERIALS AND REACHING A POSITION AS TO WHETHER THOSE MATERIALS
10:46AM 16 CONTAIN BRADY INFORMATION OR NOT.

10:46AM 17 I THINK IN IDENTIFYING THE ISSUE THAT THE DEFENSE HAS
10:46AM 18 IDENTIFIED IT WILL INFORM THAT PROCESS, IT WILL ALLOW THE
10:46AM 19 GOVERNMENT TO CONDUCT THAT REVIEW WITH A KNOWLEDGE OF WHAT THE
10:47AM 20 DEFENSE IS CONCERNED ABOUT AND THAT WILL ONLY SERVE TO INCREASE
10:47AM 21 THE RELIABILITY OF THE GOVERNMENT'S REVIEW.

10:47AM 22 BUT I DON'T --

10:47AM 23 THE COURT: HOW WOULD THOSE -- I'M SORRY TO
10:47AM 24 INTERRUPT YOU.

10:47AM 25 HOW IS THAT ANALYSIS DIFFERENT THAN YOUR AGREEMENT TO GIVE

10:47AM 1 AGENT NOTES REGARDING WITNESS INTERVIEWS? IS THERE A
10:47AM 2 DISTINCTION?

10:47AM 3 MR. BOSTIC: THE DISTINCTION -- AT LEAST ONE
10:47AM 4 DISTINCTION, YOUR HONOR, IS THE LEVEL OF THE PROSECUTION'S
10:47AM 5 ACCESS TO THE MATERIALS THAT WE'RE TALKING ABOUT.

10:47AM 6 WHEN IT COMES TO FBI AGENT NOTES, POSTAL INSPECTOR AGENT
10:47AM 7 NOTES, THE PROSECUTION HAS NEEDED ONLY TO REQUEST THOSE
10:47AM 8 MATERIALS FROM THE AGENCIES, AND WE'VE OBTAINED THEM.

10:47AM 9 WHEN IT COMES TO THE S.E.C., WE DON'T HAVE THAT SAME
10:47AM 10 RELATIONSHIP WITH THEM. WE DON'T HAVE THAT LEVEL OF CONTROL,
10:47AM 11 THE ABILITY TO DIRECT THEM TO SHARE THOSE MATERIALS WITH US,
10:47AM 12 AND --

10:47AM 13 THE COURT: I WONDER IF THERE'S AN S.E.C. ATTORNEY
10:47AM 14 IN THE ROOM THAT MIGHT ACCEDE TO THAT REQUEST?

10:47AM 15 MR. BOSTIC: YOUR HONOR, MY UNDERSTANDING, I DON'T
10:47AM 16 WANT TO SPEAK FOR THE S.E.C., BUT BASED ON OUR CONVERSATIONS
10:47AM 17 WITH THEM THE OFFER THAT THEY HAVE MADE AND THAT WE APPRECIATE
10:48AM 18 IS TO ALLOW US ACCESS TO CONDUCT THAT REVIEW OURSELVES AND
10:48AM 19 DETERMINE WHETHER THERE IS BRADY INFORMATION PRESENT IN THOSE
10:48AM 20 MATERIALS.

10:48AM 21 I THINK IT'S UNDERSTANDABLE THAT THE S.E.C. MIGHT BE
10:48AM 22 RESISTANT TO THE IDEA OF TURNING OVER THOSE MATERIALS TO THE
10:48AM 23 DEFENSE, PARTLY BECAUSE MR. BALWANI IS CURRENTLY ENGAGED IN
10:48AM 24 ACTIVE LITIGATION AGAINST THE S.E.C. IN A CIVIL MATTER.

10:48AM 25 SO GIVEN THAT THE STANDARD APPROACH WITH BRADY MATERIALS

10:48AM 1 IS FOR THE PROSECUTION TO UNDERTAKE THAT REVIEW, THAT IS AN
10:48AM 2 OBLIGATION THAT RESTS ON THE PROSECUTION, IT'S SELF-EXECUTING,
10:48AM 3 IT DOESN'T REQUIRE A COURT ORDER. THE CASES ARE VERY CLEAR ON
10:48AM 4 THAT.

10:48AM 5 TO ECHO THE COURT'S EARLIER COMMENTS, IT'S ABSOLUTELY
10:48AM 6 SOMETHING THAT THE PROSECUTORS IN THIS CASE TAKE VERY
10:48AM 7 SERIOUSLY. GIVEN THAT THAT OBLIGATION IS ALREADY ON US, WE'VE
10:48AM 8 TAKEN THE STEP TO GO BEYOND THAT AS TO THE FBI POSTAL INTERVIEW
10:48AM 9 NOTES AND TO ACTUALLY LET THE DEFENSE PARTICIPATE IN THAT
10:48AM 10 REVIEW.

10:48AM 11 AS TO THE S.E.C., WE'RE NOT IN A POSITION TO MAKE THAT
10:48AM 12 OFFER, AND I DON'T THINK THE DEFENSE IS ENTITLED TO ANYTHING
10:49AM 13 MORE THAN HAVING US CONDUCT THAT REVIEW IN GOOD FAITH, YOUR
10:49AM 14 HONOR.

10:49AM 15 THE COURT: WELL, THIS IS A BRADY REQUEST FOR THESE
10:49AM 16 NOTES FROM THESE WITNESSES.

10:49AM 17 MR. WADE: IT IS A VERY SPECIFIC BRADY REQUEST BASED
10:49AM 18 ON VERY SPECIFIC INFORMATION AND A VERY SPECIFIC OFFERING.

10:49AM 19 THE GOVERNMENT HAS BEEN AWARE OF THIS REQUEST FOR
10:49AM 20 TWO MONTHS NOW AND WE HAVE NOT RECEIVED ANYTHING SO -- AND
10:49AM 21 RESPECTFULLY, WE'RE ALL BUSY SO I, I KNOW THAT THEY DON'T JUST
10:49AM 22 GO AND READ OUR PLEADINGS AND THEN IMMEDIATELY RESPOND TO
10:49AM 23 EVERYTHING THAT WE WRITE.

10:49AM 24 THE COURT: SURE.

10:49AM 25 MR. WADE: BUT THERE'S A LITTLE BIT OF A PATTERN

10:49AM 1 HERE, YOUR HONOR, WHERE WE'RE KIND OF KICKING THE CAN DOWN THE
10:49AM 2 ROAD EXCEPT THE END OF THE ROAD HAS NOW BEEN SET AND IT'S
10:49AM 3 COMING FAST.

10:49AM 4 SO TO THE EXTENT THAT WE ARE CONTINUING TO DEFER THESE
10:49AM 5 ISSUES THAT BRING HUGE AMOUNTS OF WORK AND CHALLENGES FOR THE
10:49AM 6 DEFENSE TO BE PREPARED, TO KEEP THE ROAD METAPHOR, IT'S A
10:50AM 7 LITTLE BIT OF A COLLISION COURSE.

10:50AM 8 THE COURT: I SHOULD ASK MR. BOSTIC HOW QUICKLY HE
10:50AM 9 CAN GET THIS MATERIAL AND GET IT REVIEWED. MAYBE THAT WOULD BE
10:50AM 10 HELPFUL.

10:50AM 11 MR. BOSTIC: THAT'S A GOOD QUESTION, YOUR HONOR. IT
10:50AM 12 WILL DEPEND ON THE SPEED OF WHICH THE S.E.C. CAN PROVIDE IT,
10:50AM 13 BUT THE GOVERNMENT IS HAPPY TO MOVE FORWARD WITH THAT AS
10:50AM 14 QUICKLY AS POSSIBLE.

10:50AM 15 THE COURT: SO SHOULD I GIVE YOU OR TELL YOU I WANT
10:50AM 16 THIS DONE IN X DAYS AND THEN YOU CAN PRESENT THAT TO THE S.E.C.
10:50AM 17 AND THAT WILL GET THEM OFF THEIR SEATS PERHAPS?

10:50AM 18 MR. BOSTIC: WE'LL COMPLY WITH ANY COURT ORDER OF
10:50AM 19 COURSE, YOUR HONOR. I DON'T THINK THAT'S NECESSARY. I DON'T
10:50AM 20 THINK THE S.E.C. HAS BEEN DRAGGING ITS FEET ON THIS. I DON'T
10:50AM 21 WANT TO IMPLY THAT OR GIVE THE COURT THAT IMPRESSION.

10:50AM 22 THE COURT: NOR DO I. BUT I WANT TO GIVE A SIGNAL
10:50AM 23 HERE, AND I HOPE MY COMMENTS ARE NOT OPAQUE. I HOPE THEY'RE
10:50AM 24 CLEAR THAT I REALLY DO WANT THIS PROCESS FOR BOTH OF YOUR
10:50AM 25 BENEFITS, ALL THREE OF YOUR BENEFITS, TO GET FORWARD. LET'S

10:50AM 1 GET THROUGH THIS SO YOU CAN GET ABOUT THE BUSINESS OF TRYING
10:50AM 2 YOUR CASE AND PREPARING YOUR CASES.

10:50AM 3 MR. BOSTIC: LET ME PROVIDE SOME MORE FACTS TO THE
10:51AM 4 COURT IN CONNECTION WITH THESE TWO WITNESSES IN PARTICULAR,
10:51AM 5 MR. TOLBERT AND MR. HALL.

10:51AM 6 THE COURT: SURE.

10:51AM 7 MR. BOSTIC: MY UNDERSTANDING FROM RECENT
10:51AM 8 CONVERSATIONS WITH THE S.E.C. IS THAT AS TO ONE OF THOSE
10:51AM 9 WITNESSES THERE ARE NO INTERVIEW NOTES AT ALL.

10:51AM 10 AS TO THE OTHER, I BELIEVE THERE ARE SOMETHING ON THE
10:51AM 11 ORDER OF FOUR PAGES OF NOTES THAT WE'RE TALKING ABOUT.

10:51AM 12 SO WE'RE TALKING ABOUT A RELATIVELY SMALL UNIVERSE OF
10:51AM 13 MATERIAL THAT NEEDS TO BE REVIEWED. I THINK ONCE WE GET ACCESS
10:51AM 14 TO IT, IT WON'T TAKE LONG FOR US TO GO THROUGH IT.

10:51AM 15 I THINK THE CHANCES OF US MISSING SOMETHING IN THAT VERY
10:51AM 16 SMALL DOCUMENT, I THINK IT'S A SMALL CHANCE OR ACTUALLY NO
10:51AM 17 CHANCE AT ALL. SO I THINK THE PREFERRED APPROACH WOULD STILL
10:51AM 18 BE TO LET THE GOVERNMENT UNDERTAKE THAT REVIEW. I DON'T THINK
10:51AM 19 IT WILL TAKE LONG.

10:51AM 20 IN TURN, THE SMALL AMOUNT OF MATERIAL MEANS THAT IF THERE
10:51AM 21 IS SOMETHING THAT NEEDS TO GO OVER TO THE DEFENSE, IT WON'T BE
10:51AM 22 A MOUNTAIN OF MATERIAL THAT WILL TAKE THEM MONTHS TO REVIEW.
10:51AM 23 IT WILL BE SOMETHING VERY CIRCUMSCRIBED, SOMETHING VERY
10:51AM 24 DISCRETE THAT WON'T THREATEN THE TRIAL PREPARATION PROCESS.

10:51AM 25 THE COURT: THANK YOU. THANK YOU. IT SOUNDS

10:51AM 1 LIKE -- THAT'S VERY REVEALING AND HELPFUL. IT SOUNDS LIKE THIS
10:52AM 2 CAN BE ACCOMPLISHED IN ABOUT TWO WEEKS.

10:52AM 3 MR. BOSTIC: I WOULD HOPE SO, YOUR HONOR.

10:52AM 4 THE COURT: IT SOUNDS LIKE. SO MAY I GIVE YOU
10:52AM 5 TWO WEEKS TO GET THAT DONE AND YOU CAN LET THE S.E.C. KNOW THAT
10:52AM 6 THEY'RE ON THAT DEADLINE?

10:52AM 7 MR. BOSTIC: THAT'S FINE, YOUR HONOR.

10:52AM 8 THE COURT: AND WE CAN GET THAT ACCOMPLISHED. IF
10:52AM 9 IT'S FOUR PAGES, THEN IT'S FOUR PAGES. THEN THEY'LL PROVIDE AN
10:52AM 10 ANSWER, IF THEY DON'T HAVE NOTES AS TO ONE OF THEM, THEY'LL
10:52AM 11 PROVIDE AN AFFIRMATIVE ANSWER THAT THEY DON'T HAVE THE MATERIAL
10:52AM 12 OR SOMETHING AND THAT WOULD ADVISE ALL OF US AS TO THAT
10:52AM 13 MATERIAL.

10:52AM 14 MR. WADE: THAT SEEMS REASONABLE, YOUR HONOR.

10:52AM 15 THE COURT: OKAY. GREAT. THANK YOU.

10:52AM 16 YOU WANTED TO GO BACK TO CMS AND FDA.

10:52AM 17 MR. BOSTIC: YES. THANK YOU, YOUR HONOR. I WON'T
10:52AM 18 TALK LONG ABOUT THE IMPORTANCE OF THESE DOCUMENTS. THE
10:52AM 19 GOVERNMENT IS NOT ARGUING THAT DOCUMENTS HELD BY FDA AND CMS
10:52AM 20 ARE RELEVANT. WE DID GO THROUGH THE STEP OF COLLECTING
10:52AM 21 SIGNIFICANT AMOUNTS OF DOCUMENTS FROM THOSE AGENCIES.

10:52AM 22 I DO WANT TO MAKE SURE THAT THE CONTEXT IS NOT LOST,
10:52AM 23 THOUGH.

10:52AM 24 THE INDICTMENT ALLEGES, I BELIEVE, NINE DIFFERENT
10:53AM 25 CATEGORIES OF FALSE STATEMENTS THE DEFENDANTS MADE IN

1 FURTHERANCE OF THEIR SCHEMES TO DEFRAUD.

2 THERE ARE MISREPRESENTATIONS ABOUT THE FDA'S APPROVAL OR
3 WHAT WAS REQUIRED BY WAY OF FDA APPROVAL IS ONLY ONE OF THOSE
4 NINE CATEGORIES.

5 THE GOVERNMENT COLLECTED AND PRODUCED TO THE DEFENSE, I
6 BELIEVE, APPROXIMATELY 300,000 PAGES OF DOCUMENTS FROM THOSE
7 AGENCIES. THAT REPRESENTS ABOUT 2 PERCENT OF THE GOVERNMENT'S
8 PRODUCTION IN THIS CASE.

9 SO I WOULD PUSH BACK ON THE DEFENSE'S CHARACTERIZATION
10 THAT THE GOVERNMENT'S CASE HERE RESTS ON DOCUMENTS FROM THOSE
11 AGENCIES. I THINK THAT'S OVERSTATING IT BY QUITE A BIT.

12 BUT THAT SAID, THESE AGENCIES DO HAVE RELEVANT
13 INFORMATION. OUR ORIGINAL REQUESTS TO THE AGENCIES WERE
14 TAILORED TO CAPTURE THE MOST RELEVANT INFORMATION THAT THOSE
15 AGENCIES HAD.

16 THERE'S NO SHOWING HERE, DESPITE THE DEFENSE'S
17 IMPLICATIONS, THAT THE GOVERNMENT CHERRY PICKED DOCUMENTS FROM
18 THESE AGENCIES, THAT WE CRAFTED OUR REQUESTS TO CAPTURE
19 INCULPATORY MATERIAL ONLY AND TOLD THEM TO KEEP THE EXCULPATORY
20 MATERIAL SO THAT WE DIDN'T HAVE TO TURN IT OVER. THERE'S NO
21 HINT OF THAT, AND, INDEED, I'LL REPRESENT TO THE COURT THAT OF
22 COURSE THAT'S NOT WHAT HAPPENED.

23 THE GOVERNMENT'S CONVERSATIONS WITH THOSE AGENCIES
24 DEFINING WHAT NEEDED TO BE COLLECTED AGAIN FOCUSSED ON THE GOAL
25 OF OBTAINING THE THINGS THAT WERE MOST IMPORTANT, THE THINGS

10:54AM 1 THAT HELPED US SHOW WHAT, IN FACT, HAPPENED, WHETHER THAT WAS
10:54AM 2 EXCULPATORY OR INCULPATORY.

10:54AM 3 THE DEFENSE'S DEMAND FOR ADDITIONAL DOCUMENTS FROM THOSE
10:54AM 4 AGENCIES, THE GOVERNMENT IS NOT OPPOSING THIS MOTION BECAUSE WE
10:54AM 5 DON'T WANT THEM TO HAVE THOSE DOCUMENTS. I THINK THE RECORD
10:54AM 6 SHOULD ESTABLISH THAT.

10:54AM 7 OUR GENERAL APPROACH TO DISCOVERY IN THIS CASE HAS BEEN WE
10:54AM 8 COLLECT MATERIALS FROM A THIRD PARTY, WE TURN EVERYTHING OVER
10:54AM 9 TO THE DEFENSE. WE PRODUCED 20 MILLION PAGES. WE'RE PRODUCING
10:54AM 10 ADDITIONAL PAGES, SOME THAT WE HAVEN'T EVEN HAD A CHANCE TO
10:54AM 11 REVIEW YET.

10:54AM 12 IT IS NOT A GOAL OF OURS TO KEEP THE DEFENSE FROM HAVING
10:54AM 13 THE DOCUMENTS THAT IT THINKS IT NEEDS TO PREPARE ITS DEFENSE AT
10:55AM 14 TRIAL.

10:55AM 15 THE REASON WE'RE OPPOSING AND THE REASON THE GOVERNMENT
10:55AM 16 HAS CONCERNS ABOUT THE COURT'S PROPOSAL TO POTENTIALLY ISSUE AN
10:55AM 17 ORDER DOWN THE ROAD FOCUSES ON THE GOVERNMENT'S ACCESS TO THESE
10:55AM 18 AGENCY MATERIALS AND THAT'S REALLY WHAT THIS ALL COMES DOWN TO.

10:55AM 19 AS MENTIONED IN THE GOVERNMENT'S BRIEFING, THE GOVERNMENT
10:55AM 20 IS NOT CONCEDING MATERIALITY OF THESE MATERIALS. PARTLY THAT'S
10:55AM 21 BECAUSE WE DON'T KNOW WHAT THEY CONTAIN AND THAT AGAIN JUST
10:55AM 22 UNDERSCORES THE POINT THAT WE DON'T HAVE ACCESS TO THEM.

10:55AM 23 IN OTHER CASES THE DEFENSE CITES COURTS HAVE ATTEMPTED TO
10:55AM 24 DETERMINE WHETHER THE PROSECUTION HAS ACCESS TO AN AGENCY'S
10:55AM 25 DOCUMENTS BY EFFECTIVELY ANSWERING THE HYPOTHETICAL QUESTION

10:55AM 1 WHAT WOULD HAPPEN IF THE PROSECUTION TRIED TO OBTAIN THESE
10:55AM 2 DOCUMENTS FROM THE AGENCY? WOULD THEY BE SUCCESSFUL IN GETTING
10:55AM 3 THEM OR NOT?

10:55AM 4 AND IN ANSWERING THAT QUESTION COURTS CAN LOOK TO THINGS
10:55AM 5 LIKE WHAT HAPPENED THE LAST TIME THE PROSECUTION ASKED FOR
10:55AM 6 DOCUMENTS? HOW CLOSELY RELATED ARE THESE AGENCIES IN GENERAL
10:56AM 7 IN CONNECTION WITH THAT SPECIFIC INVESTIGATION? AND THEY CAN
10:56AM 8 USE THOSE FACTS TO REACH A CONCLUSION ABOUT WHAT WOULD HAPPEN
10:56AM 9 IF THE GOVERNMENT SOUGHT DOCUMENTS FROM THE OTHER AGENCY.

10:56AM 10 HERE IT'S NOT A HYPOTHETICAL QUESTION BECAUSE THE
10:56AM 11 PROSECUTION ACTUALLY TOOK THE STEP OF MAKING THOSE FORMAL
10:56AM 12 REQUESTS FOR THE DOCUMENTS TO THE AGENCIES, AND WE HAVE THE
10:56AM 13 RESPONSES BACK FROM THE AGENCIES THAT INDICATE WHAT THEY'RE
10:56AM 14 WILLING TO PRODUCE, WHAT ISSUES NEED TO BE ADDRESSED BEFORE
10:56AM 15 THEY CAN PRODUCE CERTAIN CATEGORIES OF DOCUMENTS.

10:56AM 16 THE DEFENSE IS QUICK TO POINT OUT EVERY QUALIFICATION IN
10:56AM 17 THOSE LETTERS, EVERY TIME THE AGENCIES GAVE SOMETHING OTHER
10:56AM 18 THAN AN UNQUALIFIED AGREEMENT TO PRODUCE, AND THAT'S WHAT
10:56AM 19 THEY'RE HERE COMPLAINING ABOUT.

10:56AM 20 BUT THE VERY FACT THAT THE AGENCIES DIDN'T SIMPLY
10:56AM 21 AUTOMATICALLY AGREE TO GIVE US EVERYTHING CONCLUSIVELY
10:56AM 22 ESTABLISHES THAT WE DON'T HAVE FULL ACCESS TO THOSE MATERIALS.

10:56AM 23 IF WE HAD ACCESS TO THOSE MATERIALS, WE WOULD HAVE
10:56AM 24 REQUESTED THEM, WE WOULD HAVE RECEIVED THEM AS A MATTER OF
10:57AM 25 COURSE, AND WE WOULD BE PRODUCING THEM TO THE DEFENSE AS A

10:57AM 1 MATTER OF COURSE.

10:57AM 2 I ALSO GET THE SENSE FROM THE DEFENSE'S ARGUMENT THAT
10:57AM 3 THEY'RE CONCERNED THAT THE AGENCIES ARE NOT PERCEIVING THESE
10:57AM 4 REQUESTS AS GENUINELY COMING FROM THE GOVERNMENT.

10:57AM 5 ON THAT POINT ALL I CAN SAY IS I WANT TO ASSURE THE
10:57AM 6 DEFENSE AND THE COURT THAT IN MAKING THESE REQUESTS WE DIDN'T
10:57AM 7 MAKE THEM WITH A WINK. WE WEREN'T CROSSING OUR FINGERS WHEN WE
10:57AM 8 PASSED THEM ALONG. IN FACT, WE EXPRESSLY MADE IT CLEAR TO THE
10:57AM 9 AGENCIES THAT ALTHOUGH THEY KNEW THAT THE DEFENSE HAD COME UP
10:57AM 10 WITH THESE CATEGORIES, THAT WE WANTED THEM TO VIEW THESE
10:57AM 11 REQUESTS AS COMING DIRECTLY FROM THE U.S. ATTORNEY'S OFFICE AND
10:57AM 12 THAT WE WANTED THEM TO TREAT THEM AS SUCH REGARDLESS OF THE
10:57AM 13 FACT THAT THEY ORIGINATE WITH THE DEFENSE.

10:57AM 14 AND I HAVE NO REASON TO THINK THAT THE AGENCIES ARE DOING
10:57AM 15 ANYTHING OTHER THAN WHAT HAS BEEN REQUESTED IN THAT REGARD.

10:57AM 16 WHEN IT COMES TO THE SEQUENCE OF EVENTS HERE, AGAIN, I
10:57AM 17 THINK IT UNDERSCORES THE POINT THAT WE AREN'T WORRIED ABOUT THE
10:57AM 18 DEFENSE HAVING THESE DOCUMENTS; THAT WE MADE THIS REQUEST,
10:58AM 19 DESPITE THE FACT THAT WE DON'T BELIEVE THAT WE'RE REQUIRED TO
10:58AM 20 COLLECT THESE DOCUMENTS; THAT WE DID NOT WAIT FOR A COURT
10:58AM 21 ORDER; THAT EVEN AFTER WE OFFERED TO MAKE THAT REQUEST AND THE
10:58AM 22 DEFENSE REJECTED THAT OFFER, WE STILL WENT AHEAD AND MADE THE
10:58AM 23 REQUEST TO THE AGENCIES TO SEE WHAT WE COULD OBTAIN.

10:58AM 24 I THINK GENERALLY THE NEWS FROM THOSE AGENCIES, THE
10:58AM 25 RESPONSES, ARE FAVORABLE TO THE DEFENSE. I THINK THERE'S

10:58AM 1 REASON TO BE OPTIMISTIC IS THAT A LOT OF THE REQUESTED
10:58AM 2 DOCUMENTS WILL BE HEADED THE DEFENSE'S WAY ONCE WE OVERCOME THE
10:58AM 3 REASONABLE ISSUES THAT THE AGENCIES HAVE RAISED.

10:58AM 4 THE PROCEDURAL PROBLEM, I THINK, WITH GRANTING THE MOTION
10:58AM 5 AND ISSUING AN ORDER RELATES TO KIND OF WHO THE ORDER WOULD
10:58AM 6 AFFECT AND WHO THE ORDER TARGETS. THERE'S BEEN A LOT OF
10:58AM 7 DISCUSSION HERE TODAY ABOUT POSITIONS THAT THEY HAVE TAKEN AND
10:58AM 8 THEIR OBLIGATIONS, BUT I THINK WE NEED TO DEFINE WHO THOSE
10:58AM 9 PRONOUNS REFER TO. I THINK THE DEFENSE'S REAL QUARREL HERE IS
10:59AM 10 WITH THE AGENCIES AND THE POSITIONS THAT THEY HAVE TAKEN ON
10:59AM 11 RESPONDING TO THE GOVERNMENT'S REQUEST.

10:59AM 12 I DON'T THINK THERE'S ANY LEGITIMATE CRITICISM OF THE
10:59AM 13 PROSECUTION'S ACTIONS HERE BECAUSE WE HAVE PASSED ALONG
10:59AM 14 VERBATIM THE SAME REQUESTS THAT THE DEFENSE MADE.

10:59AM 15 SO REALLY, REALLY THE DISPUTE REMAINING IS ABOUT WHETHER
10:59AM 16 THE AGENCIES ARE CORRECT IN TAKING THE POSITIONS THAT THEY HAVE
10:59AM 17 TAKEN.

10:59AM 18 THE PROBLEM WITH THAT IS THAT THE DEFENSE HAS RAISED THIS
10:59AM 19 ISSUE IN A WAY THAT DOESN'T PUT THOSE AGENCIES IN FRONT OF THE
10:59AM 20 COURT.

10:59AM 21 I AM NOT COUNSEL FOR THOSE AGENCIES. I REPRESENT THE
10:59AM 22 PROSECUTION HERE. BUT I'M NOT A LAWYER FOR THE FDA OR CMS.
10:59AM 23 I'M UNABLE TO SPEAK TO THEM.

10:59AM 24 THE DEFENSE HAS NOT FILED OR SERVED RULE 17 SUBPOENAS ON
10:59AM 25 THOSE AGENCIES. SUBPOENAS LIKE THAT WOULD MAKE THE AGENCIES

10:59AM 1 DIRECTLY ACCOUNTABLE TO THE DEFENSE, WOULD BRING THE AGENCIES
10:59AM 2 BEFORE THE COURT SO THAT ANY ORDER ON A MOTION TO COMPEL WOULD
11:00AM 3 BE BINDING ON THEM, BUT THEY HAVE NOT DONE THAT. THEY HAVE
11:00AM 4 CHOSEN TO RECRUIT THE PROSECUTION TO ACT AS A MIDDLEMAN IN
11:00AM 5 TRYING TO OBTAIN THESE DOCUMENTS. WE'VE DONE EVERYTHING WE CAN
11:00AM 6 IN THAT REGARD BY SERVING THAT REQUEST, AND WE'RE COMMITTED TO
11:00AM 7 CONTINUING TO DO WHATEVER WE CAN TO FACILITATE THE DISCLOSURE
11:00AM 8 OF THOSE DOCUMENTS.

11:00AM 9 BUT AN ORDER GRANTING THIS MOTION IT SEEMS TO ME WOULD
11:00AM 10 BIND THE PROSECUTION AND REQUIRE ACTION THAT WE HAVE ALREADY
11:00AM 11 TAKEN.

11:00AM 12 IT SEEMS LIKE IT WOULD NOT BE BINDING ON THE AGENTS -- OR
11:00AM 13 I'M SORRY, ON THE AGENCIES BECAUSE THE AGENCIES ARE NOT BEFORE
11:00AM 14 THE COURT IN THIS MATTER.

11:00AM 15 AGAIN, THAT'S A CHOICE THAT THE DEFENDANTS MADE TO IGNORE
11:00AM 16 THE MECHANISM THAT THEY HAVE TO ACTUALLY BRING THOSE AGENCIES
11:00AM 17 WITHIN THE JURISDICTION OF THE COURT.

11:00AM 18 THE COURT: I THINK THAT'S A FAIR OBSERVATION. I'LL
11:00AM 19 HEAR FROM THE DEFENSE, OF COURSE. BUT IT SOUNDS LIKE WHAT THE
11:00AM 20 DEFENSE IS SAYING IS THAT, WELL, YOU CAN USE YOUR OFFICE AS A
11:01AM 21 CONDUIT, IF YOU WILL, AND I DON'T MEAN THAT PEJORATIVELY. BUT
11:01AM 22 IF YOU JUST FOLLOW SANTIAGO AND THE OTHER CASES THAT SUGGEST
11:01AM 23 THAT THE GOVERNMENT DOES HAVE AUTHORITY THROUGH THAT CASE LINE
11:01AM 24 AND THOSE THEORIES IN THAT CASE, AND, THEREFORE, YOU DO STAND
11:01AM 25 IN THE SHOES, IF YOU WILL, AND THEY'RE IN YOURS OR YOU'RE IN

11:01AM 1 THEIRS TO MAKE THAT ORDER. I THINK THAT'S PART OF THEIR
11:01AM 2 ARGUMENT IF NOT THEIR ENTIRE ARGUMENT SAYING, JUDGE, YOU CAN
11:01AM 3 ISSUE THE ORDER TODAY.

11:01AM 4 I SUGGESTED EARLIER, WELL, I'LL GIVE YOU SOME TIME, AND IF
11:01AM 5 WHEN THAT TIME COMES UP IT'S INSUFFICIENT, THAT MAYBE I INVITE
11:01AM 6 AND EXTEND AN INVITATION TO MS. DYER AND MS. NORTON TO COME TO
11:01AM 7 THIS COURTROOM AND ENJOY SAN JOSE AND TELL US WHAT THE STATUS
11:01AM 8 OF THINGS ARE.

11:01AM 9 I THINK WE CAN, I THINK WE CAN DO SOMETHING -- SOME
11:01AM 10 ALTERNATIVE TO HAVING THEM APPEAR, AND I'M NOT AT ALL ADVERSE
11:01AM 11 TO HAVE THEM DO THAT. I WANT THE DEFENSE TO GET WHAT THEY'RE
11:01AM 12 ENTITLED TO. I BELIEVE YOU DO, TOO, THAT'S MY SENSE, SO WE CAN
11:02AM 13 GET THE TRIAL GOING.

11:02AM 14 AS WE ALL KNOW, SOMETIMES THE HARDEST THING IS JUST
11:02AM 15 GETTING STARTED.

11:02AM 16 MR. BOSTIC: WE DO HAVE THE SAME GOAL, YOUR HONOR.
11:02AM 17 BUT WHAT THE DEFENSE IS ENTITLED TO CAN GO NO FURTHER THAN WHAT
11:02AM 18 THE PROSECUTION HAS ACCESS TO.

11:02AM 19 THE COURT: SURE.

11:02AM 20 MR. BOSTIC: AND I THINK WE HAVE DEMONSTRATED THE
11:02AM 21 EXTENT OF OUR ACCESS BY MAKING THESE REQUESTS FORMALLY IN GOOD
11:02AM 22 FAITH AND GETTING THESE RESPONSES BACK FROM THE AGENCIES.

11:02AM 23 LIKE I SAID, WE'LL CONTINUE TO PUT IN EFFORTS TO TRY TO
11:02AM 24 SECURE THESE DOCUMENTS AND OVERCOME THE ISSUES THAT HAVE BEEN
11:02AM 25 RAISED BY THE AGENCIES, BUT RULE 16 AND BRADY CANNOT ENCOMPASS

11:02AM 1 THINGS THAT WE CAN'T GET OUR HANDS ON.

11:02AM 2 THE COURT: SURE. AND YOU'RE NOT SAYING THIS, AND
11:02AM 3 I'M NOT TRYING TO PUT YOU IN A POSITION WHERE YOU ARE,
11:02AM 4 MR. BOSTIC, BUT IT ALMOST SEEMS LIKE, WELL, GEE, JUDGE, IF YOU
11:02AM 5 JUST ISSUE THE ORDER THAT WOULD BE HELPFUL TO US BECAUSE THEN
11:02AM 6 IT IS OUT OF OUR HANDS AND WE CAN GO TO MS. DYER AND MS. NORTON
11:02AM 7 AND SAY THIS IS WHAT THAT MEAN JUDGE IN SAN JOSE TOLD US TO DO
11:03AM 8 AND YOU BETTER COMPLY.

11:03AM 9 MR. BOSTIC: QUITE -- IT'S ACTUALLY I BELIEVE THE
11:03AM 10 OPPOSITE, YOUR HONOR. I THINK THAT WOULD PUT US IN A MORE
11:03AM 11 DIFFICULT POSITION BECAUSE WE WOULD BE SET UP TO HAVE TO COMPLY
11:03AM 12 WITH THE COURT ORDER THAT WAS IN A WAY OUT OF OUR HANDS.

11:03AM 13 IF THE COURT ORDERS US TO OBTAIN AND PRODUCE THESE
11:03AM 14 MATERIALS, WELL, WE'VE ALREADY TAKEN STEPS TOWARDS THAT AND
11:03AM 15 HOPEFULLY WE CAN ACCOMPLISH IT, BUT ULTIMATELY IT IS NOT UP TO
11:03AM 16 US WHETHER WE CAN GET THESE MATERIALS, AT LEAST NOT ALL OF
11:03AM 17 THEM, AND THAT'S WHAT I'VE BEEN SAYING TO THE DEFENSE ALL
11:03AM 18 ALONG. THAT'S THE REASON WHY HAVING THAT ORDER DIRECTED AT THE
11:03AM 19 PROSECUTION WOULD MAKE US NERVOUS.

11:03AM 20 THE COURT: NO, I APPRECIATE THAT. I THINK WHEN I
11:03AM 21 CAME OUT AND TOLD YOU MY COMMENTS ABOUT GIVING THIS 60 DAYS,
11:03AM 22 WHATEVER IT IS, FORWARD TO LET THIS, WHAT HAS ALREADY BEEN
11:03AM 23 ENGAGED BEFORE, THAT WAS THE THOUGHT I HAD IN MIND, COUNSEL,
11:03AM 24 WAS DISRUPT THAT WITH AN ORDER NOW BUT PERHAPS THE THREAT OF AN
11:03AM 25 ORDER, IF THAT IS WHAT IT IS, THE PROMISE OF AN ORDER COMING

11:03AM 1 FORWARD AND MR. BOSTIC WOULD GO TO HIS OTHER AGENCIES, OR NOT
11:03AM 2 HIS BUT THE OTHER AGENCIES, IN THE CASE AND INFORM THEM OF
11:04AM 3 THAT, THE COURT'S FIRM THOUGHTS ABOUT THIS.

11:04AM 4 MR. WADE: YOUR HONOR, WITH ALL DUE RESPECT TO MY
11:04AM 5 COLLEAGUE, I'M NOT ENCOURAGED BY WHAT I'M HEARING. THE LAW IS
11:04AM 6 CLEAR. THIS ISN'T VOLUNTARY AND HISTORY DIDN'T START WHEN WE
11:04AM 7 MADE THESE REQUESTS, OKAY? THE GOVERNMENT WAS ABLE TO ACT WITH
11:04AM 8 THESE AGENCIES FOR YEARS. THE GOVERNMENT WAS ABLE TO GET
11:04AM 9 ACCESS TO THESE DOCUMENTS FOR YEARS.

11:04AM 10 THE ONLY TIME THERE'S ANY INDICATION OF ANY RESISTANCE TO
11:04AM 11 THAT IS WHEN THE DEFENSE MAKES THE REQUEST.

11:04AM 12 SANTIAGO, BRYAN, THE W.R. GRACE CASE, THE LIBBY CASE IN
11:04AM 13 THE D.D.C., ALL OF THESE CASES ARE DESIGNED TO ADDRESS EXACTLY
11:04AM 14 THIS SITUATION WHERE THE GOVERNMENT HAS THE DOORS OPEN TO IT
11:04AM 15 BUT WHEN THE DEFENSE COMES AND MAKES THE REQUEST FOR ITS
11:04AM 16 DOCUMENTS THAT ARE MATERIAL TO THE PREPARATION OF THE DEFENSE,
11:05AM 17 THOSE DOORS CLOSE. THAT -- THE LAW MAKES CLEAR AND IN THE
11:05AM 18 NINTH CIRCUIT THEY'RE NOT CLOSED. THAT ACCESS REMAINS.

11:05AM 19 AND I HEAR THE GOVERNMENT SUGGESTING THAT THAT'S NOT THE
11:05AM 20 CASE AND THAT THEY DON'T HAVE THAT ACCESS WHEN THE HISTORY OF
11:05AM 21 THEIR INTERACTIONS WITH THESE AGENCIES MAKES CLEAR OTHERWISE
11:05AM 22 AND THE LAW MAKES CLEAR THAT THERE SHOULD BE AN OBLIGATION THAT
11:05AM 23 RESTS WITH THIS PROSECUTION TEAM. THAT'S WHY I SHARE THE
11:05AM 24 COURT'S INCLINATION THAT AN ORDER MAY HELP THEM BECAUSE I
11:05AM 25 ACCEPT THEIR WORD THAT THEY WANT US TO HAVE THESE MATERIALS,

11:05AM 1 AND THAT'S WHY I WONDER WHETHER AN ORDER WILL JUST HELP MOVE
11:05AM 2 THINGS ALONG BECAUSE WHILE YOUR -- WHILE THE COURT WAS CLEAR IN
11:05AM 3 GIVING SOME GUIDANCE AND SOME THOUGHTS ON APPROPRIATE NEXT
11:05AM 4 STEPS AND THE TIMING OF THOSE STEPS, WHAT WE HEARD IN RESPONSE
11:06AM 5 TO A DEGREE WAS, BUT IT'S BEYOND OUR CONTROL. IT NEEDS TO BE
11:06AM 6 RECOGNIZED THAT THERE IS AN OBLIGATION HERE, NOT A COURTESY.
11:06AM 7 THAT'S WHAT THE LAW REQUIRES.

11:06AM 8 MR. BOSTIC: AND, YOUR HONOR, THAT'S TRUE ONLY IF
11:06AM 9 THE GOVERNMENT HAS ACCESS TO THOSE MATERIALS. THE OBLIGATION
11:06AM 10 IS COEXTENSIVE WITH THE ACCESS, AND I THINK THE EXTENT OF OUR
11:06AM 11 ACCESS IS BEST DEMONSTRATED BY THE AGENCY'S RESPONSES, AT LEAST
11:06AM 12 THAT'S THE BEST AND MOST RELIABLE EVIDENCE THAT WE HAVE.

11:06AM 13 I THINK ON THE CASE LAW MAYBE THE DEFENSE MISUNDERSTANDS
11:06AM 14 THE GOVERNMENT'S POINT. THE POINT IS THAT IN EACH OF THOSE
11:06AM 15 CASES AS I READ THEM, NONE OF THEM INVOLVE A SITUATION LIKE
11:06AM 16 THIS WHERE THE GOVERNMENT HAS ACTUALLY TAKEN THE STEP OF
11:06AM 17 REQUESTING THE DOCUMENTS IN QUESTION AND THE AGENCIES HAVE
11:06AM 18 TAKEN THE POSITIONS THAT THEY HAVE TAKEN.

11:06AM 19 IN THOSE CASES THERE WAS A REQUEST AS TO WHETHER THE
11:06AM 20 GOVERNMENT SHOULDN'T BE REQUIRED TO TAKE THAT STEP, BUT HERE
11:07AM 21 WE'VE ALREADY TAKEN IT.

11:07AM 22 I ALSO JUST WANT TO CORRECT THE RECORD ON THE GOVERNMENT'S
11:07AM 23 PREVIOUS ACCESS TO THOSE MATERIALS. THE DEFENSE IS SIMPLY
11:07AM 24 WRONG WHEN IT IMPLIES THAT WE HAD CARTE BLANCHE OR FULL ACCESS
11:07AM 25 TO THE AGENCY'S MATERIALS BEFORE THIS.

11:07AM 1 THE DEFENSE SUBMITS WITH ITS BRIEFING THE HOLD NOTICES
11:07AM 2 THAT WERE SERVED ON THOSE AGENCIES. THEY'RE VERY BROAD. THE
11:07AM 3 DOCUMENTS THAT WE ENDED UP OBTAINING FROM THOSE AGENCIES IS A
11:07AM 4 NARROWER SET, AND PART OF THE REASON FOR THAT IS THAT THE
11:07AM 5 AGENCY'S FILES WERE NOT COMPLETELY OPEN TO US. IT HAS NOT BEEN
11:07AM 6 THE CASE THAT WE CAN WALK IN AND TAKE WHATEVER WE WANTED. THE
11:07AM 7 AGENCY'S JOB IS TO CONSERVE ITS RESOURCES AND MAKE REASONABLE
11:07AM 8 RESPONSES TO REQUESTS FOR DOCUMENTS, AND IT'S CONTINUING TO DO
11:07AM 9 THAT NOW.

11:07AM 10 TO THE EXTENT THAT THE AGENCIES ARE TAKING DIFFERENT
11:07AM 11 POSITIONS NOW FROM THE POSITIONS THAT THEY TOOK EARLIER, MY
11:07AM 12 UNDERSTANDING IS THAT PART OF IT IS THAT THEY DID PREVIOUSLY
11:07AM 13 ALREADY UNDERTAKE THE WORK TO PRODUCE THOSE LARGE BATCHES OF
11:07AM 14 DOCUMENTS AND THEY NEED TO CONSERVE AGENCY RESOURCES GOING
11:08AM 15 FORWARD.

11:08AM 16 THE COURT: IN THE CIVIL CASE?

11:08AM 17 MR. BOSTIC: IN -- SO NOT ONLY IN THE CIVIL CASE,
11:08AM 18 YOUR HONOR, BUT ALSO IN RESPONSE TO THE GOVERNMENT'S EARLIER
11:08AM 19 REQUEST.

11:08AM 20 THEY EXPENDED THE RESOURCES NECESSARY TO PRODUCE WHAT WE
11:08AM 21 ALL BELIEVED WERE THE MOST RELEVANT DOCUMENTS BACK WHEN WE MADE
11:08AM 22 THOSE ORIGINAL REQUESTS, AND THEY ARE UNDERSTANDABLY CAUTIOUS
11:08AM 23 ABOUT UNDERTAKING ANOTHER BIG COLLECTION EFFORT THAT WOULD
11:08AM 24 DUPLICATE A LOT OF THAT PREVIOUS WORK.

11:08AM 25 IN ADDITION, THERE ARE LEGAL RESTRICTIONS THAT APPLY I

11:08AM 1 BELIEVE AT LEAST TO THE FDA THAT RESTRICT ITS DISCLOSURE OF
11:08AM 2 DOCUMENTS IN CRIMINAL CASES THAT AREN'T BROUGHT UNDER THE ACT
11:08AM 3 THAT THE AGENCY IS DIRECTED TO ENFORCE.

11:08AM 4 SO THESE ARE THINGS, AGAIN, THAT I'M NOT BEST SITUATED TO
11:08AM 5 ADDRESS. THEY'RE BEST ADDRESSED BY COUNSEL FOR THOSE AGENCIES,
11:08AM 6 BUT THE DEFENSE HAS MADE THE DECISION NOT TO SERVE A RULE 17
11:08AM 7 SUBPOENA THAT WOULD ALLOW THOSE AGENCIES TO MAKE THOSE
11:08AM 8 ARGUMENTS TO THE COURT.

11:08AM 9 SO I THINK THAT'S THE PROCEDURAL PROBLEM.

11:09AM 10 THE COURT: NO, I APPRECIATE THAT. AND THERE IS A
11:09AM 11 DISTINCTION.

11:09AM 12 YOU HAVE, AS YOU HAVE SAID, YOU HAVE ADVANCED THE SIX
11:09AM 13 CATEGORIES TO THE AGENCIES INITIALLY ON THEIR OWN OR AFTER YOUR
11:09AM 14 ASKING, I SHOULD SAY THE DEFENSE ASKED FOR THE CATEGORIES,
11:09AM 15 THOSE HAVE BEEN ADVANCED. THERE HAVEN'T BEEN ANY 17 SUBPOENAS
11:09AM 16 BY THE DEFENSE. YOU'VE BEEN RELYING ON THE PROSECUTION TO
11:09AM 17 PROVIDE THIS INFORMATION ON SANTIAGO AND BRYAN AND THE OTHER
11:09AM 18 CASES THAT YOU CITE.

11:09AM 19 MR. WADE: YES, YOUR HONOR. WE SEE IT AS A LEGAL
11:09AM 20 OBLIGATION. AND JUST SO WE'RE CLEAR, THOSE REQUESTS CAME AFTER
11:09AM 21 THE GOVERNMENT REPEATEDLY SAID NO. AND THEN WE SAID, OKAY,
11:09AM 22 WELL, WE FEEL SUFFICIENTLY STRONGLY ABOUT THE NEED FOR THESE
11:09AM 23 MATERIALS, AND WE'RE GOING TO FILE THE MOTION, AND THEN THE
11:09AM 24 PROMISE OF THE REQUEST CAME, AND THEN A HEARING HAPPENED, AND
11:09AM 25 THEN THE REQUEST CAME IN MAY, THE LETTER WAS SENT.

11:09AM 1 THE LAW CANNOT BE -- THE LAW CAN'T ENCOURAGE A CONTRIVANCE
11:09AM 2 IN A SITUATION LIKE THIS WHERE, OH, NOW THE DEFENSE REQUESTS
11:10AM 3 COME, WE'RE GOING TO PASS THESE THROUGH TO THE AGENCIES, AND
11:10AM 4 YOU JUST SEND US A LETTER BACK THAT SAYS WE DON'T HAVE ACCESS,
11:10AM 5 AND THEN WE DON'T HAVE THE ACCESS. THAT'S SPECIFICALLY WHAT
11:10AM 6 THESE CASES THAT HAVE BEEN CITED TO THE COURT THAT ARE SET
11:10AM 7 FORTH IN THE BRIEF ARE DESIGNED TO PROTECT AGAINST.

11:10AM 8 THE COURT: I UNDERSTAND THAT. THE GOVERNMENT,
11:10AM 9 AGAIN, IT'S NOT WHAT HAPPENED IN THIS CASE, BUT YOU'RE
11:10AM 10 SUGGESTING THAT THE GOVERNMENT CAN'T JUST MAKE A REQUEST AFTER
11:10AM 11 WE SUGGEST WE NEED MORE AND THEN THAT REQUEST BECOMES
11:10AM 12 PROPHYLACTIC AS TO ANYTHING ELSE THAT THEY HAVE TO DO. THAT'S
11:10AM 13 NOT THE WAY IT WORKS.

11:10AM 14 MR. WADE: RIGHT. I APPRECIATE THAT.

11:10AM 15 THE COURT: AND HERE THE GOVERNMENT HAS MADE THIS
11:10AM 16 REQUEST. WE DO HAVE SOME, CANDIDLY, OPAQUE RESPONSES FROM THE
11:10AM 17 AGENCIES INVOLVED HERE, AND I WOULD LOVE TO HAVE MS. DYER AND
11:10AM 18 MS. NORTON HERE TO CLEAR UP SOME OF THIS "FOGGINESS" AS YOU PUT
11:10AM 19 IT.

11:10AM 20 I JUST -- I COMMENTED EARLIER ABOUT MY TAKE IN READING ONE
11:10AM 21 OF THE LETTERS. IT SEEMED TO SAY THAT WE HAVE ALREADY PROVIDED
11:10AM 22 THIS IN THE BALWANI CIVIL CASE, SO LOOK AT THAT, THAT SHOULD
11:11AM 23 SUFFICE THE REQUEST. THAT'S HOW I -- ONE INTERPRETATION OF
11:11AM 24 THAT.

11:11AM 25 MR. BOSTIC: I MIGHT BE ABLE TO CLARIFY THAT.

11:11AM 1 THE COURT: YES, PLEASE.

11:11AM 2 MR. BOSTIC: SO MY UNDERSTANDING FROM CONVERSATIONS
11:11AM 3 WITH THE AGENCIES IS THAT THE SIX DOCUMENT CATEGORIES
11:11AM 4 IDENTIFIED BY THE DEFENSE HERE ARE SUBSETS. THEY'RE INCLUDED
11:11AM 5 WITHIN THE CATEGORIES OF DOCUMENTS THAT MR. BALWANI REQUESTED
11:11AM 6 IN HIS SUBPOENA IN THE S.E.C. CASE. I HAVE NOT HEARD EITHER
11:11AM 7 DEFENDANT DISAGREE WITH THAT, BUT THEY CAN LET US KNOW IF
11:11AM 8 THERE'S SOMETHING THAT IS NOT INCLUDED, BUT THAT'S THE AGENCY'S
11:11AM 9 READING.

11:11AM 10 THEY HAVE ALREADY UNDERTAKEN EFFORTS TO COLLECT RESPONSIVE
11:11AM 11 DOCUMENTS IN RESPONSE TO THE CIVIL SUBPOENA SO THAT WILL IN A
11:11AM 12 WAY FACILITATE THEIR PRODUCTION OF THESE SIX CATEGORIES IN THE
11:11AM 13 CRIMINAL CASE. THEY'RE NOT SAYING THAT MS. HOLMES NEEDS TO
11:11AM 14 RELY ON MR. BALWANI TO SHARE THOSE DOCUMENTS.

11:11AM 15 THEY'RE NOT SAYING I'M NOT GOING TO DO THIS WORK TWICE.
11:11AM 16 THEY'RE SIMPLY POINTING OUT THAT THOSE COLLECTION EFFORTS ARE
11:12AM 17 ALREADY UNDERWAY. WE'RE TALKING ABOUT A SUBSET.

11:12AM 18 THE COURT: WELL, THANK YOU. THAT WAS MY CONCERN
11:12AM 19 THAT THEY WERE SAYING SEE BALWANI.

11:12AM 20 MR. WADE: WELL, YOUR HONOR, WE DO HAVE COUNSEL FOR
11:12AM 21 MR. BALWANI PRESENT IN THE COURTROOM, BUT WE ALSO HAVE THE
11:12AM 22 BENEFIT OF THE PLEADING THAT THEY SUBMITTED IN THIS CASE AND
11:12AM 23 THE FACTS ARE THE FACTS. CMS HAS PRODUCED 43 DOCUMENTS IN
11:12AM 24 RESPONSE TO THE SUBPOENA, AND I DON'T THINK THAT THE FDA HAS
11:12AM 25 AGREED TO PRODUCE MANY OF THE KEY CATEGORIES.

1 MAYBE THEY'RE -- AND I DON'T READ THEIR LETTER AS
2 SUGGESTING OTHERWISE. MAYBE THEIR POSITION WILL CHANGE GIVEN
3 SOME OF THE DIRECTION THAT HAS BEEN PROVIDED BY THE COURT, BUT,
4 AGAIN, I WILL REMAIN OPEN MINDED, YOUR HONOR, BUT I FEAR THAT
5 THE LACK OF AN ORDER IS JUST GOING TO RESULT IN FURTHER DELAY
6 HERE.

7 THE COURT: OKAY.

8 MR. WADE: I DO WANT TO MAKE CLEAR, THE COURT TALKED
9 ABOUT THE IMPORTANCE OF THE BRADY OBLIGATION. THE BRADY
10 OBLIGATION DOES EXTEND TO MATERIALS THAT ARE WITHIN THE -- THAT
11 THE GOVERNMENT HAS ACCESS TO THAT ARE IN CONTROL OF THE
12 GOVERNMENT.

13 UNDER THE NINTH CIRCUIT LAW WE THINK IT'S CLEAR THAT THESE
14 ARE SUCH MATERIALS. SO WE'RE CONFIDENT THAT COUNSEL FOR THE
15 GOVERNMENT WILL MEET ITS BRADY OBLIGATIONS WITH RESPECT TO THE
16 FDA AND CMS, BUT I JUST DON'T WANT ANYTHING TO BE PERCEIVED AS
17 SOME EFFORT TO AVOID UNDERTAKING LEGAL OBLIGATIONS THAT EXIST.
18 WE'RE HAPPY TO CONFER, WE'RE HAPPY TO BE REASONABLE, BUT IN THE
19 JOINTS OF REASONABLENESS I DON'T WANT TO BE -- I DON'T WANT
20 JUSTICE AND FAIRNESS TO BE LOST.

21 THE COURT: OKAY.

22 MR. CAZARES: YOUR HONOR, MAY I ADDRESS SOME OF THE
23 ISSUES?

24 THE COURT: PLEASE.

25 MR. CAZARES: THANK YOU VERY MUCH. STEPHEN CAZARES

11:13AM 1 FOR MR. BALWANI.

11:13AM 2 YOUR HONOR, UNLIKE COUNSEL FOR MS. HOLMES WE'VE HAD, I
11:14AM 3 GUESS, THE BENEFIT OF TRYING TO GET DOCUMENTS FROM THE FDA AND
11:14AM 4 FROM CMS SINCE SEPTEMBER OF 2018.

11:14AM 5 I THINK THAT HISTORY THAT WE'VE RECOUNTED SOMEWHAT IN OUR
11:14AM 6 BRIEF I THINK PROVIDES CONTEXT TO THE OFFERS THAT THE AGENCIES
11:14AM 7 HAVE PROVIDED TO THE COURT HERE THAT YOU HAVE FOCUSED ON IN
11:14AM 8 TRYING TO COME UP WITH SOME SORT OF MIDDLE GROUND, SOME SORT OF
11:14AM 9 RESOLUTION TO AVOID ISSUING AN ORDER HERE.

11:14AM 10 THE COURT: WELL, I'M NOT AVOIDING AN ORDER. I CAN
11:14AM 11 DO THAT. I'M TRYING TO SEE IF THERE'S SOME CONSTRUCTIVE WAY TO
11:14AM 12 GET THE INFORMATION THAT YOUR TEAMS NEED.

11:14AM 13 MR. CAZARES: THAT'S WHAT I WANT TO ADDRESS BECAUSE
11:14AM 14 I THINK IT'S REALLY IMPORTANT TO UNDERSTAND THE DISTINCTION
11:14AM 15 HERE. RULE 16 ISN'T SOME EQUIVALENT TO CIVIL DISCOVERY. IT'S
11:14AM 16 NOT EQUIVALENT TO RULE 17 SUBPOENA IN A CRIMINAL CASE.

11:14AM 17 RULE 16 RELATES TO A DEFENDANT'S CONSTITUTIONAL RIGHT TO
11:14AM 18 PREPARE A DEFENSE. SO THIS IS NOT SOMETHING THAT COULD BE LEFT
11:14AM 19 TO THE DISCRETION OF AGENCY ATTORNEYS, AGENCY REPRESENTATIVES
11:14AM 20 WHETHER OR NOT THEY FEEL IN THEIR DISCRETION THAT THEY WOULD
11:15AM 21 LIKE TO WITHHOLD SOME MATERIALS BECAUSE IT SOMEHOW INVOLVES
11:15AM 22 THEIR INTERNAL DELIBERATIONS ABOUT THEIR REGULATORY OVERSIGHT
11:15AM 23 OF FAIRNESS. THAT'S NOT RULE 16, YOUR HONOR.

11:15AM 24 THE GOVERNMENT IS TRYING TO PUT A WALL BETWEEN THEMSELVES
11:15AM 25 AND CMS AND FDA.

11:15AM 1 NOW, UNDERSTAND, FOR EXAMPLE, IN THE S.E.C. CASE
11:15AM 2 MR. BALWANI ISSUED SUBPOENAS TO THE FDA AND CMS IN SEPTEMBER OF
11:15AM 3 2018. THEY'VE PRODUCED COLLECTIVELY 126 DOCUMENTS. NO
11:15AM 4 INTERNAL COMMUNICATIONS AT ALL.

11:15AM 5 IN THE CRIMINAL INVESTIGATION, FDA PRODUCED INTERNAL
11:15AM 6 E-MAILS TO THE GOVERNMENT IN RELATION TO THEIR CRIMINAL
11:15AM 7 INVESTIGATION, BUT THEY WERE SELECT, YOUR HONOR.

11:15AM 8 MR. BOSTIC REPRESENTS, AND I DON'T FAULT HIM FOR THIS,
11:15AM 9 THAT THEY OBTAINED ALL RELEVANT MATERIAL TO THE CASE AND
11:15AM 10 WEREN'T JUST LOOKING FOR INCULPATORY MATERIALS.

11:15AM 11 MAYBE SO.

11:15AM 12 BUT WHAT THE AGENCY GAVE TO THE GOVERNMENT, THE FDA, WERE
11:15AM 13 INTERNAL E-MAIL COMMUNICATIONS ONLY RELATING TO THE SEPTEMBER
11:16AM 14 2015 INSPECTION THAT RESULTED IN ADVERSE FINDINGS AND ACTIONS
11:16AM 15 BY THE AGENCY, BOTH FDA AND CMS, THAT WOUND UP SHUTTING DOWN
11:16AM 16 THE BUSINESS.

11:16AM 17 THE FDA HAD YEARS OF INTERACTION WITH THERANOS RELATING TO
11:16AM 18 THEIR DEVICES AND OVERSIGHT, EXCHANGES BACK AND FORTH, AND
11:16AM 19 LIKELY SIMILAR INTERNAL DELIBERATIONS BY FDA REGULATORS IN
11:16AM 20 THEIR OVERSIGHT OF THE COMPANY. NONE OF THAT WAS PRODUCED IN
11:16AM 21 THE DISCOVERY.

11:16AM 22 THEY'VE ONLY PRODUCED SOME OF THE INTERNAL COMMUNICATIONS
11:16AM 23 RELATING TO AN INSPECTION THAT THEY SUBMIT WAS THE RESULT OF A
11:16AM 24 COMPLAINT THAT RESULTED IN ADVERSE -- BASICALLY ACTION BY THE
11:16AM 25 AGENCY. THE RESULTS OF THAT INSPECTION ARE NOW GOING TO BE

11:16AM 1 USED BY THE GOVERNMENT IN THE CRIMINAL CASE TO SUGGEST
11:16AM 2 WRONGDOING BY THE DEFENDANTS. THAT'S SELECTIVE DISCOVERY, YOUR
11:16AM 3 HONOR. THAT'S NOT OPEN FILE. THAT'S ALSO NOT RULE 16.

11:16AM 4 BECAUSE THE PROBLEM HERE IS THE DEPARTMENT OF JUSTICE
11:16AM 5 REPRESENTS ALL FEDERAL AGENCIES.

11:16AM 6 THESE ARE NOT INDEPENDENT AGENCIES THAT HAVE THESE WALLS
11:17AM 7 BETWEEN THEM.

11:17AM 8 IN THE S.E.C. ACTION IN RESPONSE TO THE SUBPOENAS THAT WE
11:17AM 9 ISSUED TO THE FDA AND CMS, THEY PRODUCED LIMITED DOCUMENTS. WE
11:17AM 10 REACHED A POINT AFTER WE OBTAINED SIMILAR LETTERS TO WHAT THE
11:17AM 11 FDA, FOR EXAMPLE, SUBMITTED ATTACHED TO THE GOVERNMENT'S MOTION
11:17AM 12 HERE.

11:17AM 13 WE'RE GOING TO PRODUCE DOCUMENTS WITHIN A MONTH BUT WITH
11:17AM 14 THIS LAUNDRY LIST OF EXCEPTIONS INCLUDING TRADE SECRET,
11:17AM 15 CONFIDENTIAL COMMERCIAL INFORMATION, DELIBERATIVE PROCESS,
11:17AM 16 CRIMINAL LAW ENFORCEMENT PRIVILEGE, ON TOP OF ATTORNEY-CLIENT
11:17AM 17 PRIVILEGE.

11:17AM 18 NOW, NO ONE HAS AN ISSUE WITH ATTORNEY-CLIENT PRIVILEGE.
11:17AM 19 THE AGENCIES OBVIOUSLY CAN LEGITIMATELY RAISE THAT AND WITHHOLD
11:17AM 20 THOSE DOCUMENTS.

11:17AM 21 ALL OF THESE OTHER CLAIMS THAT THEY'VE RAISED IN THE
11:17AM 22 S.E.C. CASE THAT THE FDA NOW WANTS TO WITHHOLD HERE. A RULE 16
11:17AM 23 ORDER CUTS RIGHT THROUGH THAT BECAUSE NOW YOU'RE GOING TO HAVE
11:17AM 24 AN ORDER FROM THE FEDERAL COURT THAT WILL PERMIT THE AGENCY TO
11:17AM 25 RELEASE THE INFORMATION. THAT IS THE WHOLE POINT. THESE

11:18AM 1 LIMITATIONS ON THE CMS AND FDA IN RELEASING TRADE SECRET, WHICH
11:18AM 2 THEY'RE BRINGING UP, COMMERCIAL INFORMATION AND OTHER
11:18AM 3 CONFIDENTIAL BUSINESS INFORMATION, THOSE RELATE TO THEIR KIND
11:18AM 4 OF PROVIDING INFORMATION LIKE SUBJECT TO FOIA OR OTHER REQUESTS
11:18AM 5 OR EVEN CIVIL LITIGATION. THAT'S NOT AT ISSUE HERE.

11:18AM 6 HERE YOU HAVE A CRIMINAL CASE UNDER RULE 16 A DEFENDANT'S
11:18AM 7 CONSTITUTIONAL RIGHT TO PUT ON A DEFENSE.

11:18AM 8 THE COURT: HOW DO WE PROTECT THEIR INTEREST, IF AT
11:18AM 9 ALL, IF THEY INDICATE THAT THEY, THE AGENCIES, HAVE INTERNAL
11:18AM 10 REGULATIONS OR THEY HAVE RULES WHERE THEY CANNOT, THEY CAN --
11:18AM 11 THEY'RE FORBIDDEN TO RELEASE CERTAIN --

11:18AM 12 MR. CAZARES: BUT THEY'RE NOT. THAT'S GREAT --

11:18AM 13 THE COURT: I BEG YOUR PARDON. LET ME FINISH MY
11:18AM 14 QUESTION SO YOU'LL BE FULLY INFORMED.

11:18AM 15 MR. CAZARES: I APOLOGIZE.

11:18AM 16 THE COURT: SO HOW DO THEY PROTECT THEMSELVES? HOW
11:18AM 17 DO THEY PROTECT THEMSELVES FROM SOMEONE ELSE, THE CLIENT
11:18AM 18 PERHAPS SUING THEM, OR WHOEVER IT IS? HOW DO THEY DO THAT?
11:18AM 19 HOW CAN THEY RESPOND?

11:18AM 20 MR. CAZARES: THEY'D POINT TO THEIR COUNSEL, WHO
11:18AM 21 WOULD BE THE DEPARTMENT OF JUSTICE, AND THE COURT ORDER ISSUED
11:19AM 22 FROM THIS COURT. FOR EXAMPLE, AND I WAS GOING TO GET TO THIS,
11:19AM 23 IN THE S.E.C. CASE THE BACK AND FORTH DELIBERATIONS RESULTED IN
11:19AM 24 ONLY 166 DOCUMENTS BEING PRODUCED.

11:19AM 25 IN APRIL -- THIS PAST APRIL IT REACHED A POINT WHERE WE

1 PROPOSED MOTIONS TO COMPEL TO BOTH AGENCIES. WE SUBMITTED
2 DRAFT MOTIONS TO COUNSEL.

3 NOW, THOSE MOTIONS DON'T GO DIRECTLY TO THE AGENCIES.
4 THEY GO TO THE CIVIL DIVISION OF THE SAME U.S. ATTORNEY'S
5 OFFICE BECAUSE THE U.S. ATTORNEY'S OFFICE REPRESENTS THE
6 AGENCIES IN RESPONSE TO THOSE SUBPOENAS.

7 AGAIN, WE ENGAGED IN AGAIN SOME MEET AND CONFERS AND
8 BROUGHT THE AGENCIES BACK TO THE TABLE TO AT LEAST DISCUSS THE
9 ISSUE, BUT AGAIN, IT'S BEEN A COUPLE OF MONTHS. WE DON'T HAVE
10 ADDITIONAL DOCUMENTS AS A RESULT OF THOSE DISCUSSIONS AND
11 ADDITIONAL MEET AND CONFERS EVEN AFTER A PROPOSAL ABOUT MOTIONS
12 TO COMPEL AND BRING THE AGENCIES TO COURT IN THE CIVIL CASE.

13 THAT'S MY POINT, AND I THINK THAT'S COUNSEL'S POINT FOR
14 MS. HOLMES. THIS PROCESS OF DISCUSSION, MEET AND CONFER, TRY
15 TO REACH AGREEMENT OVER THIS LITANY OF CONCERNS THE AGENCIES
16 RAISE, WHICH ARE LEGITIMATE CONCERNS BUT NOT LEGITIMATE
17 CONCERNS IN A CRIMINAL CASE AT LEAST BROUGHT IN PART ON BEHALF
18 OF THE FDA.

19 THE GOVERNMENT DOESN'T DISCLAIM THE FACT THAT THE FDA OIG
20 WERE PART OF THE CRIMINAL PROSECUTION TEAM. THEY DID
21 INTERVIEWS OF 17 EMPLOYEES FROM THE FDA AND CMS IN THE COURSE
22 OF THE CRIMINAL INVESTIGATION, AND, OF COURSE, AS THE COURT
23 KNOWS, 300,000 OR SO DOCUMENTS PRODUCED BY THE TWO AGENCIES.

24 THAT'S ACCESS. IT'S NOT WHETHER OR NOT YOU HAVE ACCESS TO
25 ANY DOCUMENT THAT THE AGENCIES HAVE, INCLUDING ATTORNEY-CLIENT

11:20AM 1 PRIVILEGE. OF COURSE THEY HAVE A PRIVILEGE THEY CAN WITHHOLD
11:20AM 2 EVEN IN RESPONSE TO A RULE 16 ORDER.

11:20AM 3 BUT THAT CAN BE ADDRESSED FAIRLY EASILY AND MECHANICALLY,
11:20AM 4 YOUR HONOR. BOTH AGENCIES HAVE GENERAL COUNSEL'S OFFICES.
11:20AM 5 ATTORNEYS CAN BE IDENTIFIED.

11:21AM 6 THE COURT: PARDON ME FOR INTERRUPTING YOU. I
11:21AM 7 WONDER IF IT MAKES SENSE FOR THIS COURT TO ISSUE AN ORDER THAT
11:21AM 8 INDICATES TO THESE AGENCIES AND THESE GOOD LAWYERS WHO
11:21AM 9 REPRESENT THEIR AGENCIES TO PLEASE TELL THE COURT AND INFORM
11:21AM 10 THE COURT IN WRITING WHAT THEIR INTENT IS AS TO THESE SIX
11:21AM 11 CATEGORIES AND RELEASING THIS INFORMATION? AND THEN WE CAN
11:21AM 12 BE -- CUT THROUGH THE OPACITY OF WHATEVER IT IS THAT IS HERE
11:21AM 13 AND FIND OUT WHAT IT IS THAT THEY'RE GOING TO RELEASE AND WHY
11:21AM 14 NOT.

11:21AM 15 MR. BOSTIC, THAT MIGHT BE HELPFUL TO US AND GET THEM TO
11:21AM 16 RESPOND TO US IN TEN DAYS, OR SOMETHING LIKE THAT, SO AT LEAST
11:21AM 17 WE CAN UNDERSTAND AND THEY UNDERSTAND THAT AT LEAST THE COURT'S
11:21AM 18 FOCUS IS I WANT TO KNOW WHAT YOU'RE GOING TO DO WITH THESE SIX
11:21AM 19 REQUESTS AND THEY'RE RESPONDING NOW. IF WE GET THE SAME THINGS
11:21AM 20 BACK, THEY PROBABLY WILL BE TEMPTING THE COURT TO ISSUE AN
11:21AM 21 ORDER.

11:21AM 22 MR. WADE: YOUR HONOR, IF I MIGHT. WE MIGHT ALSO
11:21AM 23 INQUIRE IN SUCH AN ORDER WHETHER THE OBSTACLES THAT ARE SET
11:21AM 24 FORTH IN THIS CORRESPONDENCE ARE REMOVED BY AN ORDER FROM THE
11:22AM 25 COURT TO COUNSEL'S POINT.

11:22AM 1 THE COURT: WELL, THEY'LL TELL US THAT.

11:22AM 2 MR. WADE: YEAH.

11:22AM 3 THE COURT: WHY CAN'T YOU RESPOND TO THIS? AND WHEN
11:22AM 4 CAN YOU EXPECT?

11:22AM 5 THAT GETS YOU OFF THE HOOK, MR. BOSTIC. NOT THAT YOU'RE
11:22AM 6 AFRAID OF BEING ON THE HOOKS. I KNOW YOU'RE COURAGEOUS, BUT AT
11:22AM 7 LEAST IT PROVIDES AN OPPORTUNITY TO HAVE SOME DIRECT
11:22AM 8 COMMUNICATION FROM MS. DYER, MS. NORTON.

11:22AM 9 MR. BOSTIC: I APPRECIATE THE COURT'S PRAGMATIC
11:22AM 10 THINKING.

11:22AM 11 MY CONCERN WITH THAT APPROACH IS THAT I THINK IT STILL
11:22AM 12 ALLOWS THE DEFENSE IMPROPERLY TO END RUN AROUND RULE 17. AND
11:22AM 13 THE COURT ASKED A VERY GOOD QUESTION, HOW DO WE PROTECT THE
11:22AM 14 AGENCY'S INTEREST HERE? HOW DO WE ALLOW THEM TO SPEAK UP FOR
11:22AM 15 THEMSELVES? TO DEFEND THEIR POSITIONS?

11:22AM 16 THE RULE THAT ALLOWS FOR THAT IS RULE 17. THAT'S THE RULE
11:22AM 17 THAT DEFENDANTS USE TO BRING THIRD PARTIES BEFORE THE COURT
11:22AM 18 WHEN NECESSARY TO COMPEL THEM TO PRODUCE DOCUMENTS.

11:22AM 19 THE DEFENSE HERE HAS DECIDED NOT TO PURSUE THAT ROUTE.
11:22AM 20 THAT LEAVES US WITHOUT A MECHANISM TO BRING THOSE AGENCIES HERE
11:22AM 21 TO ANSWER FOR THEMSELVES.

11:23AM 22 MY CONCERN IS THAT, AGAIN USING THE PROSECUTION AS AN
11:23AM 23 INTERMEDIARY THAT WAY, WE'RE HAPPY TO DO WHAT WE CAN, AS I
11:23AM 24 SAID, TO FACILITATE THE PRODUCTION OF THOSE DOCUMENTS
11:23AM 25 VOLUNTARILY, BUT TO USE US TO ORDER THE AGENCIES TO DO

11:23AM 1 SOMETHING THROUGH US, MY CONCERN IS THAT IT'S -- THAT IT'S NOT
11:23AM 2 WHAT THE LAW INTENDED WHEN IT CAME UP WITH THE SCHEME THAT
11:23AM 3 INCLUDES RULE 17.

11:23AM 4 THE COURT: I APPRECIATE THAT. AND I THINK COUNSEL,
11:23AM 5 AS YOU KNOW, IS SUGGESTING, JUDGE, YOU KNOW, THE SHORT ROAD TO
11:23AM 6 ALL OF THIS IS FOR THE COURT TO FIND THAT THE GOVERNMENT IS
11:23AM 7 APPROPRIATELY SITUATED IN A POSITION TO PROVIDE THIS
11:23AM 8 INFORMATION GIVEN THE GUIDANCE OF SANTIAGO AND OTHER CASES, AND
11:23AM 9 THE COURT SHOULD MAKE THAT FINDING TODAY, AND THEN ORDER THE
11:23AM 10 GOVERNMENT TO PROCEED, AND THEN WE'LL SEE WHAT OBJECTIONS
11:23AM 11 HAPPEN.

11:23AM 12 YOU KNOW, THAT HAS SOME CURRENCY. THAT DOES HAVE SOME
11:23AM 13 ARGUMENT GOING ITS WAY.

11:23AM 14 I'M PAUSING HERE NOT BECAUSE THERE'S ANY RELUCTANCE TO
11:24AM 15 ISSUE SUCH AN ORDER, BUT THE ONLY PAUSE I HAVE IS THAT YOU HAVE
11:24AM 16 ENGAGED A PROCESS NOW. WE HAVE SOME LETTERS THAT SUGGEST THAT
11:24AM 17 THIS IS ONGOING. I'D LIKE TO KEEP THAT ONGOING IF I CAN BUT
11:24AM 18 NOT TO THE EXTENT THAT IT, THAT IT JEOPARDIZES ANYBODY'S
11:24AM 19 PREJUDICES, ANYBODY'S RIGHTS HERE TO A FAIR AND JUST AND SPEEDY
11:24AM 20 TRIAL. THAT INCLUDES THE GOVERNMENT AS WELL. I WANT TO MAKE
11:24AM 21 SURE THAT THIS INFORMATION IS, IF IT'S RELEVANT, IF IT'S
11:24AM 22 LEGALLY AVAILABLE TO THE DEFENSE, THAT THEY HAVE IT.

11:24AM 23 YOUR EFFORTS TO ADVANCE THAT, NOTWITHSTANDING ANY 17
11:24AM 24 MOTION OR ANYTHING ELSE, I APPRECIATE THAT. I THOUGHT WHEN YOU
11:24AM 25 DID THIS A MONTH AGO WHEN WE WERE TALKING THAT, WELL, THIS

11:24AM 1 LOOKS GOOD. THIS IS THE GOVERNMENT ENGAGING THIS AND HOPEFULLY
11:24AM 2 WE'LL GET SOMETHING BACK. I DID NOT -- I'M NOT IN THE BELTWAY
11:24AM 3 SO I'M NOT USED TO THESE TYPE OF LETTERS. YOU MIGHT BE.

11:25AM 4 MR. WADE: SOMETIMES PROSECUTORS ARE STRENGTHENED BY
11:25AM 5 ORDERS FROM THE COURT AND IT CAN HELP CUT THROUGH --

11:25AM 6 THE COURT: MY SENSE IS EVERYONE IS WHO RECEIVES
11:25AM 7 ONE.

11:25AM 8 MR. WADE: I'VE SENSED THAT PATTERN AS WELL, YOUR
11:25AM 9 HONOR.

11:25AM 10 THE COURT: THANK YOU. ANYTHING FURTHER? I DIDN'T
11:25AM 11 MEAN TO CUT YOU OFF, MR. CAZARES.

11:25AM 12 MR. CAZARES: YOUR HONOR, UNLESS YOU HAVE A QUESTION
11:25AM 13 AGAIN, I DON'T THINK THAT ENGAGING THE AGENCIES IN A DEBATE
11:25AM 14 REGARDING WHETHER OR NOT THEY FEEL THAT THEY CAN PRODUCE
11:25AM 15 MATERIALS LAWFULLY OR REFUSE TO PRODUCE MATERIALS LAWFULLY IN
11:25AM 16 RESPONSE TO A RULE 16 ORDER IN A CRIMINAL CASE IS APPROPRIATE.
11:25AM 17 I UNDERSTAND WE MAY BE THERE ANYWAY, BUT TO ME THAT'S NOT WHAT
11:25AM 18 HAPPENED IN BRYAN. BRYAN WAS DEALING WITH THE I.R.S., NOT THE
11:25AM 19 DEPARTMENT OF JUSTICE. THAT'S NOT WHAT HAPPENED IN GRACE.
11:25AM 20 AGAIN, YOU'RE DEALING WITH THIRD PARTY FEDERAL AGENCIES.
11:25AM 21 THAT'S MY CONCERN, YOUR HONOR.

11:25AM 22 THE COURT: OKAY. THANK YOU VERY MUCH.

11:25AM 23 MR. WADE: THANK YOU, YOUR HONOR.

11:25AM 24 THE COURT: WHAT ELSE WOULD YOU LIKE ME TO KNOW?

11:25AM 25 MR. WADE: NOTHING.

11:25AM 1 IF THERE'S ONE SMALL POINT THAT I COULD ADDRESS ON --
11:26AM 2 SETTING ASIDE THE MOTION AND COMING BACK TO SOME OF THE INITIAL
11:26AM 3 COMMENTS THAT WERE MADE WITH REGARD TO DISCOVERY ISSUES BECAUSE
11:26AM 4 THEY, TOO, RELATE TO THE, YOU KNOW, THE TRIAL DATE THAT IS
11:26AM 5 BEFORE US, I JUST WANT TO MAKE SURE THAT THE RECORD HERE IS
11:26AM 6 CLEAR THAT SOME OF THESE REMAINING OBLIGATIONS -- I DON'T EVEN
11:26AM 7 KNOW WHAT A GIGABYTE OF DATA IS, YOUR HONOR.

11:26AM 8 MY GUESS IS THAT IF YOU PRINTED IT OUT IT WOULD FILL THIS
11:26AM 9 ROOM. WE HAVE A LOT OF MATERIAL LEFT TO GO. I KNOW THE
11:26AM 10 GOVERNMENT HAS BEEN WORKING DILIGENTLY. THIS TAINTING PROCESS
11:26AM 11 IS ONGOING.

11:26AM 12 JUST TO MAKE CLEAR TO THE COURT, IT APPEARS THAT THERE
11:26AM 13 COULD BE MONTHS OF THAT STILL AHEAD. THE NUMBER OF DOCUMENTS
11:26AM 14 THAT THEY IDENTIFIED WERE IN THE HUNDREDS OF THOUSANDS. THE
11:26AM 15 PAGES ARE I THINK TWO AND A HALF MILLION PAGES OF DOCUMENTS.

11:26AM 16 SO WE WILL CONFER WITH THE GOVERNMENT. WE WILL COME BACK.
11:26AM 17 WE'LL FIND A SCHEDULE THAT WE THINK WILL KEEP THIS CASE ON
11:26AM 18 TRACK FOR THE TRIAL DATE THAT THE COURT HAS SET FOR THE MATTER,
11:26AM 19 BUT WE HAVE A LOT OF WORK TO DO.

11:27AM 20 TO THE EXTENT THAT THE COURT CONTINUES TO ENCOURAGE PROMPT
11:27AM 21 AND EXPEDITIOUS FULFILLMENT OF OBLIGATIONS, BY ALL MEANS,
11:27AM 22 THAT'S NEWS TO THE EARS OF THE DEFENSE.

11:27AM 23 WE WANT TO BE READY AND ORGANIZED TO PRESENT A COHERENT
11:27AM 24 DEFENSE TO THIS COURT AND IN AN EXPEDITIOUS WAY WHEN THIS TRIAL
11:27AM 25 OCCURS, AND WE HAVE A LOT OF WORK TO DO TO GET THERE.

11:27AM 1 THE COURT: THANK YOU VERY MUCH. MR. BOSTIC.

11:27AM 2 MR. BOSTIC: ONLY TO SAY THAT THE GOVERNMENT WANTS
11:27AM 3 THE SAME THINGS. WE WANT THINGS TO PROCEED EXPEDITIOUSLY.

11:27AM 4 ON THE TAINING REVIEW, LET ME JUST CLARIFY THAT THE
11:27AM 5 DEFENSE -- MY UNDERSTANDING IS THAT THE DEFENSE NOW HAS ALL OF
11:27AM 6 THE DOCUMENTS ENCOMPASSED BY THAT FILTER REVIEW. SO THE
11:27AM 7 ONGOING REVIEW IS ONLY DELAYING THE TRIAL TEAM, THE
11:27AM 8 GOVERNMENT'S TRIAL TEAM'S ACCESS TO THOSE MATERIALS AND NOT
11:27AM 9 DELAYING THE DEFENSE'S ACCESS.

11:27AM 10 ON THE --

11:27AM 11 MR. WADE: I'M SORRY.

11:27AM 12 MR. BOSTIC: ON THE FDA AND CMS DOCUMENTS, I AGREE
11:27AM 13 WITH THE COURT THAT I THINK PROVIDING SOME ADDITIONAL TIME FOR
11:28AM 14 THE PROCESS TO PLAY OUT MAKES SENSE. I THINK THAT THE ISSUES
11:28AM 15 RAISED IN THE RESPONSE LETTERS FROM THE FDA AND CMS ARE
11:28AM 16 SURMOUNTABLE. I THINK WE CAN FIND SOLUTIONS TO THOSE ISSUES.
11:28AM 17 AND LIKE I SAID BEFORE, I'M OPTIMISTIC ABOUT BEING ABLE TO
11:28AM 18 OBTAIN THE VAST MAJORITY OF THOSE DOCUMENTS FOR THE DEFENSE.

11:28AM 19 THE COURT: WELL, THANK YOU. I HOPE YOUR OPTIMISM
11:28AM 20 WAS WELL PLACED WITH THOSE AGENCIES.

11:28AM 21 SO WHILE YOU WERE SPEAKING -- YOU DON'T HAVE TO LEAVE THE
11:28AM 22 LECTERN YET BECAUSE I MIGHT WANT YOUR THOUGHTS ON THIS -- I DID
11:28AM 23 OPINE THAT THE COURT COULD ISSUE AN ORDER ASKING MS. NORTON AND
11:28AM 24 MS. DYER TO GIVE SOME CLARITY AS TO THEIR LETTERS.

11:28AM 25 I DON'T WANT TO HAVE ANY DIRECT CONTACT OR COMMUNICATION

11:28AM 1 WITH THEM, IF YOU WILL, THOSE TWO LAWYERS. I DON'T THINK
11:28AM 2 THAT'S APPROPRIATE AT THIS POINT.

11:28AM 3 BUT I DO IN SOME MEASURE WANT TO GET THAT MESSAGE TO THEM.
11:28AM 4 I WANT TO -- WHAT I'D LIKE TO DO IS TO ALLOW THIS ENGAGEMENT
11:28AM 5 THAT MR. BALWANI AND HIS TEAM HAS PUT TOGETHER TO GO FORWARD
11:29AM 6 FOR A BRIEF PERIOD OF TIME JUST TO ALLOW IT TO COME TO FRUITION
11:29AM 7 OR IF IT CAN HAPPEN IN SHORT ORDER.

11:29AM 8 BUT I DO WANT TO CONVEY TO THESE AGENCIES MY CONCERN ABOUT
11:29AM 9 THE OBJECTIONS THAT THEY RAISE, AND I THINK COUNSEL IS
11:29AM 10 ABSOLUTELY RIGHT THAT THE BEST WAY TO ACCOMPLISH THAT IS
11:29AM 11 THROUGH A DIRECT ORDER TO HAVE THEM PRODUCE THE DOCUMENTS AND
11:29AM 12 THEN THEY CAN OBJECT OR THEY CAN SAY WHATEVER IT IS. MAYBE
11:29AM 13 THAT'S WHEN THEIR LAWYERS COME IN.

11:29AM 14 AND THEN YOU CAN THROW YOUR HANDS UP, MR. BOSTIC, YOU AND
11:29AM 15 MS. SCHENK, AND CAN SAY, YOU KNOW, THAT'S WHAT THE JUDGE SAID
11:29AM 16 SO PUT YOUR OBJECTIONS IN NOW. I CAN DO THAT.

11:29AM 17 BUT AS I'VE TOLD YOU, I WILL GIVE YOU AN OPPORTUNITY TO
11:29AM 18 HAVE YOUR GOOD EFFORTS GO FORWARD AND YOU COMMUNICATE WITH
11:29AM 19 THESE INDIVIDUALS AND IF THEY WANT TO TELL US WHAT THEIR
11:30AM 20 OBJECTIONS ARE IN SOME SHORT ORDER, AND BY THAT I MEAN IF WE
11:30AM 21 CAN GET SOMETHING FROM THEM IN TWO WEEKS THAT TELL US WHAT
11:30AM 22 THEY'RE GOING TO DO OR WHY THEY'RE NOT GOING TO DO IT, THAT
11:30AM 23 WOULD INFORM ALL OF US, AND IT WOULD INFORM ME AS TO WHAT I
11:30AM 24 SHOULD DO NEXT AND HOW WE SHOULD PROCEED NEXT. THAT WOULD BE
11:30AM 25 VERY INSTRUCTIVE TO ME.

11:30AM 1 I UNDERSTAND RULE 16. MR. CAZARES EDUCATED US A LITTLE
11:30AM 2 BIT MORE ON THAT THIS MORNING. I UNDERSTAND IT. I UNDERSTAND
11:30AM 3 THE SANTIAGO CASES THAT WERE PRESENTED BY THE DEFENSE. I THINK
11:30AM 4 THERE IS SOME GOOD MERIT TO THEM, CANDIDLY.

11:30AM 5 LET ME JUST TURN TO YOU, MR. BOSTIC, AND YOUR TEAM AND
11:30AM 6 JUST TELL YOU I THINK THEY'RE ON SOME SOLID FOOTING IN THOSE
11:30AM 7 CASES.

11:30AM 8 HE'S GOING TO SAY, WELL, ISSUE THE ORDER, JUDGE, AND I
11:30AM 9 THINK I'VE TOLD YOU WHY I'M NOT GOING TO DO THAT. I'M GOING TO
11:30AM 10 ALLOW THIS PROCESS TO GO FORWARD AND SEE WHAT YOU CAN REVEAL IN
11:31AM 11 A COUPLE OF WEEKS AND HOPEFULLY THAT WILL BE FRUITFUL.

11:31AM 12 WHY DON'T WE SET A STATUS HEARING, AND I'VE ASKED YOU TO
11:31AM 13 STAY AT THE LECTERN TO GIVE ME YOUR THOUGHTS ON WHEN THAT
11:31AM 14 SHOULD BE JUST TO FOLLOW UP ON THIS.

11:31AM 15 WHAT I'LL DO IS I'LL CONTINUE THE HEARING ACTUALLY, LET'S
11:31AM 16 JUST CONTINUE THE HEARING, I'LL CALL IT THAT, BECAUSE THE COURT
11:31AM 17 HASN'T MADE A DECISION AS TO WHETHER OR NOT IT IS GOING TO
11:31AM 18 ISSUE AN ORDER, BUT I THINK I'VE TOLD YOU WHAT MY THOUGHT IS.

11:31AM 19 SO WHAT WOULD WORK FOR YOU? AND I WANT TO GIVE YOU SOME
11:31AM 20 CONTROL, MR. BOSTIC, BECAUSE YOU HAVE TO DEAL WITH THE
11:31AM 21 BUREAUCRACY, IF YOU WILL.

11:31AM 22 MR. BOSTIC: THANK YOU, YOUR HONOR. WE'RE HAPPY TO
11:31AM 23 PASS ALONG THE COURT'S THOUGHTS TO THE AGENCIES AND SEE WHAT
11:31AM 24 PROGRESS WE CAN MAKE.

11:31AM 25 THE COURT: GREAT.

11:31AM 1 MR. BOSTIC: AT THE SAME TIME WE WILL WORK WITH THE
11:31AM 2 DEFENSE ON A PROTECTIVE ORDER THAT WILL ADDRESS THE AGENCY'S
11:31AM 3 CONCERNS.

11:31AM 4 THE COURT: GREAT.

11:31AM 5 MR. BOSTIC: AND THE POSSIBILITY OF GETTING A WAIVER
11:31AM 6 THAT WILL ADDRESS THE AGENCY'S CONCERNS AND THE POSSIBILITY OF
11:31AM 7 GETTING A WAIVER THAT WILL ADDRESS OTHER AGENCY CONCERNS. TO
11:31AM 8 ALLOW TIME FOR THOSE THINGS TO TAKE PLACE I WOULD ASK FOR
11:32AM 9 THREE WEEKS IF THE COURT IS WILLING TO GIVE IT.

11:32AM 10 MR. WADE: I FEEL LIKE I'M LOOKING AT FAMILY FEUD
11:32AM 11 HERE, YOUR HONOR, WITH THE RED X'S ON THE BOARD.

11:32AM 12 THE COURT: OH, IGNORE THOSE. THEY DON'T MEAN A
11:32AM 13 THING. HOW ABOUT THE WEEK OF THE 16TH OR THE 29TH?

11:32AM 14 MR. BOSTIC: EITHER WORKS FOR THE GOVERNMENT, YOUR
11:32AM 15 HONOR. THE LATER IT IS, THE MORE WE'LL BE ABLE TO ACCOMPLISH
11:32AM 16 IN THE MEANTIME, BUT I UNDERSTAND THE COURT AND THE DEFENSE
11:32AM 17 WANT THINGS TO MOVE QUICKLY.

11:32AM 18 MR. WADE: IT WOULD SEEM TO ME THE 16TH IS PROBABLY
11:32AM 19 THE BEST DATE, YOUR HONOR.

11:32AM 20 THE COURT: DO YOU WANT TO CONSULT WITH YOUR
11:32AM 21 COLLEAGUES?

11:32AM 22 MR. WADE: YEAH, LET ME CONSULT WITH MY COLLEAGUES
11:32AM 23 AND MY CALENDAR.

11:32AM 24 THE COURT: THAT'S FINE.

11:32AM 25 (PAUSE IN PROCEEDINGS.)

11:33AM 1 THE COURT: LET ME OFFER THE 17TH, THE 18TH, OR THE
11:33AM 2 19TH, OR AGAIN THE 30TH OR 31ST.

11:33AM 3 MR. WADE: HAVING SEEN SOME LAWYERS HAD THEIR PHONES
11:33AM 4 RING OUT THERE, I MADE THE DECISION TO TURN MINE OFF. SO WITH
11:33AM 5 THE COURT'S INDULGENCE, I'M JUST LOGGING ON TO MY SCHEDULE. I
11:33AM 6 THINK THE 17TH WOULD WORK FOR THE DEFENSE.

11:34AM 7 MR. CAZARES: YES, YOUR HONOR.

11:34AM 8 MR. BOSTIC: AND THAT'S FINE FOR THE GOVERNMENT.
11:34AM 9 THANK YOU.

11:34AM 10 THE COURT: OKAY. NOW, LET ME ASK TIMING FOR TRAVEL
11:34AM 11 TIME. WHAT IS BEST FOR YOU ALL?

11:34AM 12 MR. WADE: I THINK IN AN AFTERNOON HEARING, AN EARLY
11:34AM 13 AFTERNOON HEARING. WITH THE COURT'S INDULGENCE.

11:34AM 14 THE COURT: SURE.

11:34AM 15 (DISCUSSION AMONGST COUNSEL OFF THE RECORD.)

11:34AM 16 MR. WADE: ACTUALLY, YOUR HONOR, 10:00 A.M. LIKE THE
11:34AM 17 HEARING TODAY WOULD WORK WELL.

11:34AM 18 MR. BOSTIC: THAT'S FINE.

11:34AM 19 MR. CAZARES: THAT'S FINE.

11:34AM 20 THE COURT: LET'S DO THAT.

11:34AM 21 MR. WADE: YOUR HONOR, IF I MAY MAKE ONE MORE
11:34AM 22 SUGGESTION JUST FOR CASE MANAGEMENT PURPOSES.

11:34AM 23 MAYBE IF WE WERE TO HAVE A DATE BY WHICH WE SUBMIT A
11:34AM 24 PROPOSED SCHEDULED TO THE COURT IN ADVANCE OF THAT AND THAT WAY
11:34AM 25 AT THAT HEARING WE CAN HAVE THE CALENDARS OUT AND TRY AND

11:34AM 1 RESOLVE ANY DISPUTES THAT WE MAY HAVE.

11:34AM 2 THE COURT: THAT'S HELPFUL. THANK YOU FOR THAT.

11:34AM 3 THAT WOULD BE HELPFUL.

11:34AM 4 MR. BOSTIC: ARE WE TALKING ABOUT A PROPOSED

11:34AM 5 PRETRIAL CALENDAR?

11:34AM 6 MR. WADE: YES.

11:34AM 7 MR. BOSTIC: I THINK THAT'S A GOOD IDEA.

11:34AM 8 THE COURT: OKAY. THANK YOU. I APPRECIATE YOU

11:34AM 9 ADVANCING THAT. ALSO, AFTER YOU HAVE YOUR MEET AND CONFER, AND

11:35AM 10 I ANTICIPATE IT'S GOING TO BE JUST EMINENTLY SUCCESSFUL, SHOULD

11:35AM 11 YOU NEED TO ADJUST THE 17TH, THAT IS, TO MOVE IT TO TAKE IT OFF

11:35AM 12 CALENDAR BECAUSE EVERYONE IS SATISFIED, JUST LET MS. KRATZMANN

11:35AM 13 KNOW AND WE CAN MAKE ANY ADJUSTMENTS THAT WE NEED ON THAT.

11:35AM 14 THAT'S ALWAYS OPEN.

11:35AM 15 MR. WADE: OPTIMISM SPRINGS ETERNAL, YOUR HONOR.

11:35AM 16 THE COURT: IT DOES. IT DOES. EVEN BOSTON WINS A

11:35AM 17 WORLD SERIES NOW AND THEN. ANYTHING CAN HAPPEN. ANYTHING

11:35AM 18 FURTHER?

11:35AM 19 MR. BOSTIC: JUST ONE HOUSEKEEPING MATTER.

11:35AM 20 THE COURT: YES.

11:35AM 21 MR. BOSTIC: I BELIEVE, OF COURSE, THE PARTIES ARE

11:35AM 22 EACH CONTINUING THEIR INVESTIGATIONS AND REVIEW OF DISCOVERY.

11:35AM 23 IT MIGHT BE APPROPRIATE TO EXCLUDE TIME THROUGH THE TRIAL DATE.

11:35AM 24 THE COURT: THANK YOU. I WAS GOING TO DO THAT. WE

11:35AM 25 HAVE A TRIAL DATE SET. IT'S THE COURT'S INTENT THEN, BASED ON

11:35AM 1 OUR DISCUSSION HERE, AND WE'RE ONLY AT DISCOVERY, BUT I WILL
11:36AM 2 EXCLUDE TIME TO ALLOW FOR EFFECTIVE PREPARATION OF COUNSEL.
11:36AM 3 TIME IS EXCLUDED TO OUR TRIAL DATE FOR BOTH DEFENDANTS IN THIS
11:36AM 4 MATTER.

11:36AM 5 ALL RIGHT. THANK YOU VERY MUCH.

11:36AM 6 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:36AM 7 MR. WADE: THANK YOU, YOUR HONOR.

11:36AM 8 MR. CAZARES: THANK YOU.

11:36AM 9 THE COURT: AND WE HAVE AN S.E.C. CASE. SHOULD WE
11:36AM 10 CALL THAT NOW BEFORE EVERYONE LEAVES?

11:36AM 11 MS. LAMARCA: SURE.

11:36AM 12 THE COURT: THANK YOU FOR YOUR PATIENCE.

11:36AM 13 MS. LAMARCA: SUSAN LAMARCA WITH THE S.E.C.

11:36AM 14 THE COURT: THANK YOU. GOOD MORNING.

11:36AM 15 MR. KATZ: GOOD MORNING, YOUR HONOR. MARC KATZ FOR
11:36AM 16 THE S.E.C.

11:36AM 17 THE COURT: THANK YOU. NICE TO SEE YOU AGAIN.

11:36AM 18 MR. CAZARES: GOOD MORNING AGAIN, YOUR HONOR,
11:36AM 19 STEPHEN CAZARES FOR THE MR. BALWANI.

11:36AM 20 THE COURT: THANK YOU. GOOD MORNING. SO WHAT
11:36AM 21 SHOULD WE DO IN THIS CASE?

11:36AM 22 MS. LAMARCA: I THINK THE ONLY MATTER THAT WE HAVE
11:36AM 23 IN OUR JOINT STATEMENT WAS THE CONFIRMATION OF DATES THAT WE
11:36AM 24 AGREED COULD BE PUSHED OUT ANOTHER I THINK IT WAS 120 DAYS THE
11:36AM 25 COURT SET FOR THE CUTOFF OF REGULAR DISCOVERY, AND WE CAN HAD

11:36AM 1 HAD A LATTER EXPERT DISCOVERY DATE AND SO WE WANTED TO MAKE
11:36AM 2 SURE THAT THE COURT WENT AHEAD AND ORDERED THAT DATE.

11:36AM 3 MR. CAZARES: THAT'S ACCEPTABLE, YOUR HONOR, YES.

11:37AM 4 MS. LAMARCA: GREAT. THANK YOU, YOUR HONOR.

11:37AM 5 THE COURT: THANK YOU VERY MUCH. GOOD SEEING YOU
11:37AM 6 ALL. THANK YOU.

11:37AM 7 MR. DOWNEY: THANK YOU, YOUR HONOR.

11:37AM 8 THE CLERK: COURT IS ADJOURNED.

11:37AM 9 (COURT CONCLUDED AT 11:37 A.M.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: JULY 2, 2019